(9)

No. 95-1228-CFX Title: United States, Petitioner
v.
Jerry E. Wells and Kenneth R. Steele

Docketed: February 1, 1996 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	Jan 31 1996	Petition for writ of certiorari filed. (Response due March 2, 1996)
	Mar 4 1996	Brief of respondents Jerry Wells and Kenneth Steele in opposition filed.
	Mar 13 1996	DISTRIBUTED. March 29, 1996
	Mar 20 1996	Reply brief of petitioner United States filed.
	Mar 27 1996	REDISTRIBUTED. April 12, 1996
	Apr 15 1996	REDISTRIBUTED. April 19, 1996
	Apr 22 1996	Petition GRANTED. SET FOR ARGUMENT November 4, 1996. **********
	May 31 1996	Order extending time to file brief of petitioner on the merits until June 13, 1996.
	Jun 13 1996	Joint appendix filed.
	Jun 13 1996	Brief of petitioner United States filed.
	Jul 10 1996	Order extending time to file brief of respondent on the merits until July 24, 1996.
	Jul 24 1996	Brief of respondents Jerry E. Wells and Kenneth R. Steele filed.
	Jul 24 1996	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Aug 14 1996	Application (A96-115) to extend the time within which to file a reply brief on the merits, submitted to Justice Thomas.
	Aug 14 1996	Application (A96-115) granted by Justice Thomas extending the time to file until September 10, 1996.
	Aug 29 1996	Record filed.
	Sep 10 1996	CIRCULATED.
	Sep 10 1996	Reply brief of petitioner United States filed.
	Nov 1 1996	Record filed.
	Nov 4 1996	ARGUED.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

JERRY E. WELLS AND KENNETH R. STEELE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

PAUL A. ENGELMAYER
Assistant to the Solicitor General

WILLIAM C. BROWN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

28 pp

QUESTION PRESENTED

18 U.S.C. 1014 imposes criminal penalties on a person who "knowingly makes any false statement or report * * * for the purpose of influencing in any way the action," *inter alia*, of a federally insured bank. The question presented is whether the materiality of the false statement or report is an element of the offense described by Section 1014.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Statutory provision involved	2
Statement	3
Reasons for granting the petition	8
Conclusion	16
Appendix A	1a
Appendix B	21a
Appendix C	22a

TABLE OF AUTHORITIES

Cases:

Kay v. *United States*, 303 U.S. 1 (1938)	8, 9, 10, 11
Liparota v. *United States*, 471 U.S. 419 (1985)	9
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986)	9
Staples v. *United States*, 114 S. Ct. 1793 (1994)	9
Theron v. *United States Marshal*, 832 F.2d 492 (9th Cir. 1987), cert. denied, 486 U.S. 1059 (1988)	12
United States v. *Adler*, 623 F.2d 1287 (8th Cir. 1980)	7
United States v. *Beer*, 518 F.2d 168 (5th Cir. 1975)	8
United States v. *Bonnette*, 663 F.2d 495 (4th Cir. 1981), cert. denied, 455 U.S. 951 (1982)	12
United States v. *Cleary*, 565 F.2d 43 (2d Cir. 1977), cert. denied, 435 U.S. 915 (1978)	12
United States v. *Gaudin*, 115 S. Ct. 2310 (1995)	6, 9, 12, 15
United States v. *Haddock*, 956 F.2d 1534 (10th Cir.), cert. denied, 113 S. Ct. 88 (1992)	12-13
United States v. *Lopez*, 71 F.3d 954 (1st Cir. 1995)	12, 13
United States v. *Rapp*, 871 F.2d 957 (11th Cir.), cert. denied, 493 U.S. 890 (1989)	13
United States v. *Ribaste*, 905 F.2d 1140 (8th Cir. 1990)	6

Cases—Continued: Page

United States v. *Ryan*, 828 F.2d 1010 (3d Cir. 1987) 12
United States v. *Shabani*, 115 S. Ct. 382 (1994) 9
United States v. *Spears*, 49 F.3d 1136 (6th Cir. 1995) 12
United States v. *Staniforth*, 971 F.2d 1355 (7th Cir. 1992) 12, 13
United States v. *Thompson*, 811 F.2d 841 (5th Cir. 1987) 12
United States v. *Thurnhuber*, 572 F.2d 1307 (9th Cir. 1977) 13
Williams v. *United States*, 458 U.S. 279 (1982) 11

Constitution and statutes:

U.S. Const.:
Amend.V (Double Jeopardy Clause) 16
Amend. VI 6
Home Owners' Loan Act of 1933, § 8(a) 12 U.S.C. 1467(a) 9-10, 11
15 U.S.C. 645 14
15 U.S.C. 714m 14
18 U.S.C. 287 ..... 7, 12
18 U.S.C. 371 ..... 3, 4
18 U.S.C. 922(a)(6) 12
18 U.S.C. 1001 ..... 7, 12
18 U.S.C. 1007 14
18 U.S.C. 1010 14
18 U.S.C. 1014 ..... *passim*
18 U.S.C. 1026 14
18 U.S.C. 1033(a)(1) 12
18 U.S.C. 1158 14
18 U.S.C. 1621 11
18 U.S.C. 1623 12
22 U.S.C. 1980(g) 14
22 U.S.C. 2197(n) 14
30 U.S.C. 941 14

Statutes—Continued: page

33 U.S.C. 931 14
42 U.S.C. 3220 15

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 63 F.3d 745.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1995. A petition for rehearing was denied on November 2, 1995. App., *infra*, 21a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1014 of Title 18 provides:

Loan and credit applications generally; renewals and discounts; crop insurance.

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation or a company the Corporation reinsures, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers Home Administration, the Rural Development Administration, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act [*sic*], upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $1,000,000 or imprisoned not more that 30 years, or both.

STATEMENT

Following a jury trial, respondents were convicted in the United States District Court for the Western District of Missouri of conspiring to violate 18 U.S.C. 1014 by making false statements to federally insured banks for the purpose of influencing the decisions of those banks, in violation of 18 U.S.C. 371 (Count One), and of making false statements to the O'Bannon Bank, a federally insured bank, for the purpose of influencing the decisions of that bank, in violation of 18 U.S.C. 1014 (Count Two).[1] Each respondent was sentenced to a two-year term of probation. The court of

[1] Following the close of the evidence, the district court entered judgments of acquittal on two other counts, each of which alleged that respondents had made a false statement to another bank. App., *infra*, 6a.

appeals vacated respondents' convictions and remanded to the district court for retrial. App., *infra*, 20a.

1. In 1986, respondents and Jim Russell jointly purchased a business that leased and serviced copier equipment, and they renamed that business Copytech Systems, Inc. When respondents and Russell purchased the business, they assumed responsibility for more than $8 million in debts, in addition to a serious cash flow problem. To remedy the cash shortage, respondents obtained cash financing for Copytech by assigning, to financial institutions, Copytech's right to future lease payments from customers' copier leases. App., *infra*, 2a-3a.

Beginning in 1987, in order to obtain financing, respondents and Russell conspired together to misrepresent the terms of Copytech's agreements with its customers to federally insured financial institutions.[2] The misrepresentations related to the terms of a particular lease-and-service agreement that Copytech had with customers known as the "Copier Management Program" (CMP). Under that program, Copytech leased copier equipment and provided service and supplies for that equipment in return for a monthly fee covering both the lease payments and the cost of servicing the copiers. Under its financing agreements with banks, Copytech would assign a bank its right to receive customers' monthly fees; in return, the bank would provide Copytech with financing. Copytech would retain the obligation to pay the

[2] Before respondents' trial, Russell pleaded guilty pursuant to a plea agreement to one count of conspiring with respondents to make false statements to federally insured banks in violation of 18 U.S.C. 371, and to three counts of making false statements. App., *infra*, 3a n.1. Russell testified against respondents at trial. *Id.* at 17a.

cost of servicing its customers' copiers as those costs were incurred. App., *infra*, 4a-5a.

Respondents' conspiracy involved deceiving the banks into believing that Copytech did not have any ongoing service obligations to customers. Those misrepresentations were made because two banks had required that Copytech maintain a cash reserve bank account equal to 15% of the value of Copytech's lease contracts. The reserve was designed to insure that Copytech would be able to cover monthly service costs in the event of a customer's default on monthly payments and to protect the banks in the event that Copytech went out of business. To avoid the requirement of maintaining such a reserve account, Copytech altered its contracts with customers to state that the customer alone bore responsibility for service, while entering into separate contract addenda with the customers that shifted responsibility for servicing the leased copy equipment back to Copytech. Copytech then sent the revised leases to the banks from which it was seeking funding, but did not send the banks the service addenda. By withholding the service addenda, Copytech concealed its service and maintenance obligations from the banks, and thereby obtained funding without having to maintain cash reserves to cover service costs. The conspiracy to omit reference to the hidden service costs of CMP contracts formed the principal basis of Count One. App., *infra*, 4a-6a.

Also to obtain financing for Copytech, respondents provided the O'Bannon Bank with unconditional personal loan guarantees purportedly signed by respondents' wives. In fact, respondents had forged the signatures of their wives, who had not given them signature authority. App., *infra*, 6a-7a, 18a. The scheme

to make false representations to the O'Bannon Bank that its financing of Copytech had been guaranteed by respondents' wives formed the basis of Count Two.

2. The district court instructed the jury that the elements of the offense described by Section 1014 are (1) that the bank was federally insured; (2) that the defendant knowingly made or caused to be made a false statement to the bank as alleged in the indictment; and (3) that the defendant made that false statement "for the purpose of convincing the bank to purchase lease contracts." App., *infra*, 22a. The court further instructed the jury that "[a] statement or representation is 'false' when it is untrue when made or effectively conceals a material fact." *Ibid.* The court then instructed that "[t]he materiality of the statement or representation alleged to be false or concealed is not a matter with which you are concerned and should not be considered by you in determining the guilt or innocence of the defendant." *Id.* at 22a-23a. Following Eighth Circuit precedent, see *United States* v. *Ribaste*, 905 F.2d 1140, 1143 (1990), the court itself decided the issue of materiality, and held that the statements had been materially false. App., *infra*, 8a & nn.3-4.

3. The court of appeals vacated respondents' convictions and remanded for a new trial. App., *infra*, 1a-20a. The court of appeals noted that, while the case was pending on appeal, this Court had held, in *United States* v. *Gaudin*, 115 S. Ct. 2310, 2320 (1995), that when materiality is an element of an offense, the defendant's Sixth Amendment right to a jury trial mandates that the jury determine whether that element has been established. The court of appeals held that, in light of *Gaudin*, the district court erred in

deciding the issue of materiality rather than submitting it to the jury. App., *infra*, 7a-9a & n.3.

The court of appeals rejected the argument that, because the term "material" does not appear in Section 1014's definition of the offense, materiality is not an element of that offense. The court of appeals noted that it had previously held that materiality is an element of the offenses described by 18 U.S.C. 1001 and 18 U.S.C. 287, although "neither statute lists materiality as an element of the crime." App., *infra*, 10a (citing *United States* v. *Adler*, 623 F.2d 1287, 1291 n.5 (8th Cir. 1980)).[3] The court of appeals found "no reason to treat § 1014 any differently from the similarly worded §§ 287 and 1001." App., *infra*, 12a. The court of appeals further observed that a majority of the courts of appeals have held that materiality is an element of Section 1014. App., *infra*, 12a. The court rejected the argument that those courts have inquired into materiality in reviewing convictions

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[3] Section 1001 (18 U.S.C. 1001) provides: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both."

Section 287 (18 U.S.C. 287) provides: "Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided by this title."

under Section 1014 in order "to exclude trifles from its coverage," not because materiality is "a statutorily required element of the crime." App., *infra*, 13a. Rather, the court of appeals stated, the canon that "'[w]hen dealing with a pervasive, all-encompassing statute, * * * courts must be extremely careful to insure that reasonable limits are observed'" justifies reading a materiality element into Section 1014. App., *infra*, 13a (quoting *United States* v. *Beer*, 518 F.2d 168, 170 (5th Cir. 1975)).[4]

REASONS FOR GRANTING THE PETITION

The text of 18 U.S.C. 1014 does not include a materiality requirement. The Eighth Circuit's holding that the materiality of the false statement is nonetheless an element of 18 U.S.C. 1014 deepens a longstanding conflict among the circuits on that issue. Reading a materiality element into Section 1014

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[4] The court of appeals rejected respondents' claim that the evidence at trial had been insufficient to establish respondents' guilt. In finding the evidence sufficient to establish that the false statements that formed the basis of Count One were material, the court of appeals held that the fact that banks had required reserve accounts as a precondition to financing the CMP leases "is sufficient to support a finding that the withheld information was material, or in other words, had the capacity to influence the financial institution." App., *infra*, 18a. In finding the evidence sufficient to establish that the false statements that formed the basis of Count Two were material, the court of appeals held that "[t]he fact that O'Bannon Bank asked the defendants to have their wives sign unconditional loan guarantees supports a reasonable inference that personal loan guarantees from the defendants' spouses would have the capacity of influencing the bank." *Ibid.* Because the convictions were vacated, the court of appeals did not have occasion to address the sentencing issues that the government had raised in a cross-appeal. *Id.* at 19a.

also conflicts with this Court's construction of a similarly worded predecessor statute to Section 1014 in *Kay* v. *United States*, 303 U.S. 1, 5-6 (1938), and with the principle that the task of defining the elements of a criminal offense is entrusted exclusively to Congress.

The question whether materiality is an element of Section 1014 has taken on new importance following the decision in *United States* v. *Gaudin*, *supra*, which requires that when materiality is an element of a crime, it must be decided by the jury, not the judge. If the court of appeals' interpretation of that statute is allowed to stand, prosecutors in jurisdictions that have engrafted a materiality element onto Section 1014 will bear the burden at trial of persuading juries that materiality has been established beyond a reasonable doubt, despite the fact that Congress did not include such a requirement in the statute itself. This Court's review is therefore necessary to resolve the circuit conflict on the proper construction of this important federal statute.

1. This Court has often emphasized that "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 114 S. Ct. 1793, 1796 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)); see *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986) ("[I]n determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive."); cf. *United States* v. *Shabani*, 115 S. Ct. 382, 385 (1994) (because overt act is not mentioned in federal drug conspiracy statute, 21 U.S.C. 846, it is not an element of the offense). In

Kay v. *United States*, *supra*, this Court applied that tenet in the context of a predecessor statute to Section 1014. That statute (Section 8(a) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1467(a)), rendered it a crime to make

> any statement, knowing it to be false, or [to] willfully overvalue[] any security, for the purpose of influencing in any way the action of the Home Owners' Loan Corporation or the Board or an association upon any application, advance, discount, purchase, or repurchase agreement, or loan, under this Act * * *.

Kay, 303 U.S. at 3 & n.1. Kay, the second mortgagee of a property on which a loan had been sought from the Home Owners' Loan Corporation, had overstated the amount of her claim against the property in a consent form to accept bonds of the Corporation in full settlement of her debt. *Id.* at 5. On appeal, she challenged her conviction on the ground that her false statements had been immaterial, because "any statement in the consent of a second mortgagee as to the balance due cannot endanger or directly influence any loan made by the Corporation." *Ibid.*

This Court rejected Kay's claim. It held that the materiality of the false statement was not an element of the offense described by Section 8(a):

> It does not lie with one knowingly making false statements with intent to mislead the officials of the Corporation to say that the statements were not influential or the information not important. There can be no question that Congress was entitled to require that the information be given in good faith and not falsely with intent to mislead. Whether or not the Corporation would act favorably on the loan is not a matter which concerns one seeking to deceive by false information. The case is not one of an action for damages but of criminal liability and actual damage is not an ingredient of the offense.

303 U.S. at 5-6.

In all relevant respects, Section 1014 parallels Section 8(a). Both statutes criminalize a knowing false statement to a covered financial institution when the defendant made the false statement "for the purpose of influencing in any way the action" of that institution. Neither statute includes the term "material." The court of appeals' holding that materiality is an element of Section 1014 therefore cannot be squared with *Kay*, or with the absence from the text of Section 1014 of any materiality requirement.

Nothing in the legislative history of Section 1014 suggests that Congress intended materiality to be an element of that offense. Section 1014 was enacted in 1948, and it represented a codification of 13 separate false-statement statutes relating to different financial or credit institutions. *Williams* v. *United States*, 458 U.S. 279, 288 (1982). One of those statutes was Section 8(a). Congress' use of language in Section 1014 that parallels that of former Section 8(a) indicates that Congress expected that the courts would interpret that language as it had been interpreted in *Kay*. See *Williams*, 458 U.S. at 284 (listing elements of Section 1014, and not including materiality). The absence of the term "material" from Section 1014 is particularly significant given Congress' express inclusion of a materiality limitation in other false-statement statutes. See, *e.g.*, 18 U.S.C. 1621 (per-

jury); 18 U.S.C. 1623 (false declarations before grand jury or court); 18 U.S.C. 922(a)(6) (false statement on firearms application); 18 U.S.C. 1033(a)(1) (false statement on insurance application).[5]

2. Based on *Kay*, the Second Circuit has long held that materiality is not an element of Section 1014. See *United States* v. *Cleary*, 565 F.2d 43, 46 (1977), cert. denied, 435 U.S. 915 (1978). The majority of the courts of appeals, however, have held that the materiality of the false statement is an element of Section 1014. See, *e.g.*, *United States* v. *Lopez*, 71 F.3d 954 (1st Cir. 1995); *United States* v. *Ryan*, 828 F.2d 1010, 1013 n.1 (3d Cir. 1987); *United States* v. *Bonnette*, 663 F.2d 495, 497 (4th Cir. 1981), cert. denied, 455 U.S. 951 (1982); *United States* v. *Thompson*, 811 F.2d 841, 844 (5th Cir. 1987); *United States* v. *Spears*, 49 F.3d 1136, 1141 (6th Cir. 1995); *United States* v. *Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992); *Theron* v. *United States Marshal*, 832 F.2d 492, 496 (9th Cir. 1987), cert. denied, 486 U.S. 1059 (1988); *United States* v. *Haddock*, 956 F.2d 1534, 1549

[5] Instead of looking to those statutes, the court of appeals found (App., *infra*, 12a) "no reason to treat § 1014 any differently" from 18 U.S.C. 1001 and 18 U.S.C. 287, which, the court stated (App., *infra*, 11a), have been read to contain an implicit materiality component. The first of the three clauses of Section 1001, however, expressly uses the term "material"; there is reason to question whether materiality is an element of the other two clauses of Section 1001, which do not contain that term, see note 3, *supra* (setting out text of Section 1001); *United States* v. *Gaudin*, 115 S. Ct. 2310, 2320-2321 (1995) (Rehnquist, C.J., concurring). In any event, both Section 1001 and Section 287 are differently worded from Section 1014, and, significantly, neither contains Section 1014's requirement that the defendant must have acted with the "purpose of influencing" the actions of specific covered financial institution.

(10th Cir.), cert. denied, 113 S. Ct. 88 (1992); *United States* v. *Rapp*, 871 F.2d 957, 964 (11th Cir.), cert. denied, 493 U.S. 890 (1989).

Those courts have generally argued that a materiality requirement is necessary to exclude from prosecution under Section 1014 trivial false statements incapable of influencing a bank. See, *e.g.*, *United States* v. *Staniforth*, 971 F.2d at 1358. A similar purpose, however, is already served by Section 1014's distinctive intent requirement, which requires prosecutors to establish not only that the defendant knowingly made a false statement, but that the defendant made the false statement "for the purpose of influencing in any way the actions" of a covered financial institution. 18 U.S.C. 1014. That requirement narrows the scope of Section 1014 to statements that the defendant subjectively believes would prompt the bank to act, an intent that would rarely exist (or be capable of being proved) when the statement made or fact concealed was trivial in character. See *United States* v. *Lopez*, 71 F.3d at 961 (noting that proof of the requisite "purpose of influencing" will usually require an inference from proof of actual materiality); *United States* v. *Thurnhuber*, 572 F.2d 1307, 1309 n.1 (9th Cir. 1977) ("[a]n individual is not likely to provide immaterial and unimportant information in the hope of influencing a bank's action"); *Staniforth*, 971 F.2d at 1537-1538. There is no reason to conclude that Congress intended an additional, implicit materiality requirement to serve the same purpose.

3. Before this Court's decision last Term in *Gaudin*, the view held by most courts of appeals that Section 1014 contains an implicit materiality element had limited practical significance. That was because almost every court of appeals had also held that the

issue of materiality was to be resolved by the district court itself. District courts routinely held in cases brought under Section 1014 that the materiality element had been satisfied. Moreover, because the appellate cases holding that the materiality of a false statement is an element of Section 1014 typically held that the false statements in question had been material, the United States had little occasion to ask this Court to review those holdings. See cases cited at page 12, *supra*.

Following *Gaudin*, however, as the court of appeals recognized, when the materiality of a false statement is an element of a statute, it is now for the jury to resolve that issue. App., *infra*, 8a-9a. In light of that development, the decisions incorrectly treating the materiality of a false statement as an element of the Section 1014 offense have far greater practical importance. The government will now be obliged to persuade juries, beyond a reasonable doubt, of the existence of an element that Congress did not require for conviction under Section 1014.[6]

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[6] The decisions holding that materiality is an element of Section 1014 may also carry over to prosecutions under similarly worded federal statutes that punish the making of a false statement "for the purpose" of influencing official actions in a variety of benefit programs, although those statutes, like Section 1014, lack any express materiality limitation. See 15 U.S.C. 645 (relating to the Small Business Administration); 15 U.S.C. 714m (Commodity Credit Corporation); 18 U.S.C. 1007 (Federal Deposit Insurance Corporation); 18 U.S.C. 1010 (Department of Housing and Urban Development and Federal Housing Administration); 18 U.S.C. 1026 (certain Department of Agriculture programs); 18 U.S.C. 1158 (Indian crafts); 22 U.S.C. 1980(g) (compensation for commercial fishing vessels); 22 U.S.C. 2197(n) (Overseas Private Investment Corporation); 30 U.S.C. 941 (black lung benefits); 33 U.S.C. 931 (longshore and harbor workers' compensation); 42 U.S.C. 3220 (certain economic development funds administered by the Secretary of Commerce).

It is true that, in light of the requirement of proving a "purpose of influencing" the covered institution, few, if any, indictments are likely to be brought under Section 1014 unless the statement made or fact concealed was actually materially false. Nevertheless, it is axiomatic that the decisions of juries are unpredictable. Conditioning a conviction on the jury's having found the existence of an extraneous element heightens the chances that, solely as a result of speculation or confusion regarding that extra element, a jury will not return a verdict of guilty that it otherwise regards as warranted. The addition of a materiality element in cases brought under Section 1014 poses a particular risk of such speculation or confusion, because jurors will usually have had personal experiences with financial and credit institutions. Despite a legal standard that focuses inquiry on whether the false statement had "a natural tendency to influence" a decision of the financial institution, *Gaudin*, 115 S. Ct. at 2313, defense lawyers may be able to mislead jurors to inquire, based on their own experiences, whether the bank's action on the particular loan application or other submission at issue would in fact have been any different absent the falsehood.

The decision below can also be expected to prolong trials in which a defendant is charged with violating Section 1014, because, in order to minimize the possibility that the jury will find a statement to have been immaterially false, the government will often be

required to offer otherwise unnecessary evidence at trial as to why the false statement was material. Such evidence might include testimony about the practices of the financial or credit institution that received the false statement, or about the practices of such institutions in general. In some cases, the defense can be expected to challenge such testimony, either through cross-examination or by presenting its own evidence. While it is appropriate to expect the government to produce and defend evidence of materiality where a defendant is charged with an offenses for which materiality is an element, it is unnecessary and injurious to the interest of justice to impose such a burden where Congress has not made materiality an element of the offense. And, because a jury's acquittal of a defendant is insulated from appellate review under the Double Jeopardy Clause, the government will no longer have the opportunity to obtain appellate review if the issue of materiality is resolved against the government by the trier of fact.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

PAUL A. ENGELMAYER
Assistant to the Solicitor General

WILLIAM C. BROWN
Attorney

JANUARY 1996

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 93-3924, 93-3932, and 94-1031

UNITED STATES OF AMERICA, APPELLEE,

v.

JERRY E. WELLS, APPELLANT,

UNITED STATES OF AMERICA, APPELLEE,

v.

KENNETH R. STEELE, APPELLANT,

UNITED STATES OF AMERICA,
APPELLANT/CROSS-APPELLEE,

v.

JERRY E. WELLS, APPELLEE/CROSS-APPELLANT,
UNITED STATES OF AMERICA,
APPELLEE/CROSS-APPELLANT,

v.

KENNETH R. STEELE, APPELLANT/CROSS-APPELLEE*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

[Filed Aug. 21, 1995]

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* The HONORABLE MICHAEL J. MELLOY, Chief United States District Judge for the Northern District of Iowa, sitting by designation.

Before MORRIS S. ARNOLD, Circuit Judge, JOHN R. GIBSON, Senior Circuit Judge, and MELLOY,* Chief District Judge.

MELLOY, Chief District Judge.

Appellants, Jerry E. Wells and Kenneth R. Steele, were tried on one count of conspiracy to make material false statements and three counts of making material false statements to federally insured financial institutions, in violation of 18 U.S.C. §§ 371 and 1014. The court granted judgment of acquittal as to two counts of making material false statements. The appellants were ultimately convicted of the one count of conspiracy and one count of making a material false statement. The defendants appeal their conviction on Counts I (conspiracy) and II (making false statements). The United States of America cross-appeals, alleging errors by the court at sentencing. We vacate the defendants' convictions and remand to the district court for re-trial.

I. Background

The charges against the appellants relate to the appellants' roles in obtaining financing for their jointly owned business, Copytech Systems, Inc. Copytech, previously known as Doss Office Systems, Inc., was in the business of leasing and servicing copier equipment. At all times relevant to the charged crimes, Copytech was owned by three business associates, the defendants Wells and Steele, and

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convicted co-conspirator, Mr. Jim Russell.[1] Defendant Wells was an attorney who provided legal services to Doss Office Systems, Inc. before Wells, Steele and Russell purchased it in May 1986. In 1986, the prior owner of the business approached Wells and Steele[2] with an offer to sell the company. Wells and Steele then invited Russell to purchase a share of Doss Office Systems. In May 1986, Wells and Steele's holding company, W & S Holding Company, Inc. (formed specifically for the purpose of purchasing Doss), purchased a two-thirds share of Doss, and Russell purchased the remaining one-third share. The company's name changed from Doss Office Systems to Copytech in 1987.

When Wells, Steele and Russell purchased Copytech, they inherited a company beset by financial trouble. They assumed, in addition to a serious cash flow problem, responsibility for over $8 million in debt. To remedy the cash shortage, Copytech obtained financing through the assignment of future lease payments from its customers' copier leases. Copytech would sell its rights to receive the future lease payments to a financial institution for cash. The leases were sold for a lump sum payment equal to the present value of the sixty-month lease income streams, discounted to yield the bank a 13%-15% profit.

[1] Before the appellants' trial, Mr. Russell pled guilty, pursuant to a plea agreement, to one count of conspiring with the appellants, and to three counts of making false statements.

[2] Defendant Steele had participated in previous business ventures with Mr. Wells.

Count I charged the defendants with conspiring to make material false statements to the banks providing such financing, and Count II alleged one instance of making material false statements to one of the banks. Specifically, the charges relate to sales of Copytech's interest in a particular form of lease/service agreement known as Copier Management Program (CMP) leases.

Under the CMP program, Copytech leased copier equipment and provided service and supplies for the leased equipment for one monthly lease/service fee. The CMP monthly lease payments were structured to cover both the fixed cost of providing the copiers and the variable cost of servicing the copiers ("soft costs"). The sale agreements under which Copytech sold its interest in the CMP leases provided for the assignment of Copytech's interest in the leases' income streams to the participating banks, but not the assignment of Copytech's obligations under the CMP leases. Copytech retained the obligation to pay the "soft costs" as the costs were incurred.

When the three Copytech owners purchased Copytech, the company had two established sources of funding: Boatmen's Bank of Kansas City and First State Bank of Joplin. Boatmen's Bank required Copytech to maintain a cash reserve account, equal to 15% of the value of the lease contracts, to cover the "soft" service costs in the event of a customer's default on monthly payments, or in case Copytech went out of business. In the face of overdrafts at First State Bank, however, Copytech moved its portfolio from Boatmen's to First State. By moving its money, it freed the reserve account and was able to apply the

$500,000 reserve balance to cover its First State overdrafts.

In late 1986 or early 1987, Norwest Bank offered to purchase CMP contracts from Copytech. Because Norwest was aware of the dual lease/service nature of the CMP contracts and Copytech's service obligation under the contracts, it required Copytech to maintain a cash reserve account similar to the account that Boatmen's Bank had required. Copytech turned down Norwest's offer because it needed more money up front and did not want to tie up cash in a reserve account.

The conspiracy charges allege that the conspiracy began after the Norwest experience. After turning down Norwest's offer to purchase CMP contracts, Copytech's owners agreed to misrepresent their service obligations in order to avoid the requirement of maintaining a reserve account. To that end, Copytech altered the language in the CMP lease contracts. The original CMP contract language stated that the lessor (Copytech) was solely responsible for installation and maintenance of the equipment. The revised CMP contract contained the following language:

> Lessee (customer) will keep the leased equipment in good repair and first-class mechanical condition without cost or liability to the lessor ([Copytech])
>
> . . . .
>
> This lease constitutes the entire agreement of the parties with respect to the subject matter thereof; may not be changed or modified except in writing

. . . . This lease may only be modified, extended or renewed by a writing signed by the parties hereto.

Although this language expressly states that Copytech does not have any responsibility to service the copiers, revised CMP contracts were executed in conjunction with CMP service addenda shifting the responsibility for servicing the leased copy equipment back onto Copytech. Copytech would then send the CMP leases to its funding sources without including the CMP addenda. By withholding the service addenda from the financial institutions, Copytech was able to hide the service and maintenance obligation and obtain funding without being required to maintain cash reserves to cover service costs.

At the close of evidence, the court entered judgment of acquittal as to Counts III and IV, each alleging the making of a false statement to Bank IV. The only Counts submitted to the jury were Count I, conspiracy to make false statements, and Count II, making a false statement to O'Bannon Bank.

Count I alleged a conspiracy to make material false statements, in violation of 18 U.S.C. § 1014, by omitting any reference to the hidden service costs of CMP contracts. The defendants argue that the omission of information cannot constitute a false statement, that the information on the contract was not technically "false" because the information supplied was literally true, and that in any case, the omission was not material to the transaction. Count II alleged that the defendants made material false statements to O'Bannon Bank by submitting unconditional personal

guaranties bearing the signatures of the defendants' wives, knowing full well that they had forged the signatures of their wives. The defendants admit that they had signed their wives' signatures, but maintain that the signatures do not constitute "false" statements because they had the authority, or at least a good faith belief that they had the authority, to sign their spouses' names to the loan guarantees. They also argue that their spouses' loan guarantees were not material to the transactions.

II. Trial Errors

The appellants raise several issues on appeal. They claim that the evidence produced at trial was insufficient to prove guilt beyond a reasonable doubt on each element of both Counts I and II, that Count I failed to allege a violation of 18 U.S.C. § 1014, and that the court erred in excluding certain expert evidence introduced by the defense and in failing to give a multiple conspiracy instruction as to Count I. In addition, the appellants argue that the court erred in determining the "materiality" of the charged material false statements as a matter of law rather than submitting the issue to the jury.[3] Based on

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[3] The appellants raised the issue of failure to submit materiality to the jury during trial and preserved error on this issue. Appellants also raised the issue in their motion for a new trial. We address this issue despite the fact that it was not raised directly in the appellants' brief on appeal. Under past Eighth Circuit law, the element of materiality in a prosecution for violation of a statute like 1014 was clearly a question for the judge. During the pendency of this appeal, however, the issue has been revived in light of the Supreme Court's recent opinion in *Gaudin v. United States*, — U.S. ——, 115 S.Ct. 2310 (1995). Because the defendants did not waive this issue and the

these claimed errors, the appellants request entry of judgment of acquittal or reversal of the convictions and remand for new trial.

A. Judicial Determination of Materiality:

The defendants were convicted of conspiring to make false statements and making false statements for the purpose of influencing a federally insured banking institution, in violation of 18 U.S.C. §§ 371 and 1014. The trial court required the government to prove the materiality of the false statements charged under both counts I and II as an element of proving both §§ 371 and 1014. The materiality issue was hotly disputed; however, the trial judge determined that the statements were material as a matter of law and instructed the jury that they were not to deliberate on the issue of materiality. The appellants argue that removing the question of materiality from the jury violated their constitutional right to have a jury decide each element of the charged crimes.[4]

The Fifth Amendment right to due process of the law and the Sixth Amendment right to a jury trial, together, mandate that a jury must determine every element of the crime with which a defendant is

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appellees acknowledge that the issue was raised, at least peripherally on appeal, we address the issue here. We did request and receive supplemental briefs after the *Gaudin* decision on this issue.

[4] The trial judge was of the opinion that the issue of materiality should be submitted to the jury. He stated: ". . . I really think it's a jury issue as to whether the representations were material or not material." Tr. 1737. He went on to state, however, that controlling Eighth Circuit law required him to decide the issue as a matter of law.

charged. *United States v. Gaudin*, —U.S.——, 115 S.Ct. 2310 (1995). Where a criminal statute requires proof of the "materiality" of a false statement as an element of a crime, a defendant's right to a jury trial is violated when the court removes consideration of that element from the jury and determines materiality as a matter of law. *Id.* at 2320.

In *Gaudin*, the defendant had been convicted of violating the false statement portion of 18 U.S.C. § 1001, which like § 1014, does not explicitly list materiality as an element of the crime. *Id.* at 2313. At trial, the district court instructed the jury that the charged false statements were material as a matter of law. On appeal, the Ninth Circuit Court of Appeals reversed the conviction based on Ninth Circuit precedents dictating that materiality be determined by a jury. The Supreme Court granted certiorari to resolve a split among the circuits on the question of whether the "materiality" of false statements is a matter for the judge to decide or an element of the crime to be submitted to a jury.

The Supreme Court held that, "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *Id.* at 2320. Because it was uncontested that a conviction under the false statement prong of § 1001 required proof that the statements be "material", the court affirmed the Ninth Circuit decision reversing the conviction on the basis of the trial court's improperly removing consideration of materiality from the jury. *Id.*

In the instant case, the appellants argue that "materiality" is an essential element of proving a violation of 18 U.S.C. § 1014 and that judicial determination of materiality at trial violated their constitutional right to trial by jury. The government counters that since 18 U.S.C. § 1014 does not explicitly include the term materiality in its definition of the crime,[5] materiality is not an element of the crime in the sense that judicial determination of materiality would violate a defendant's constitutional right to have a jury decide each element of a charged crime. Since all of the parties acknowledge that the court removed the question of materiality from the jury, we must resolve the issue of whether materiality is an element of proving a charge of making a false statement in violation of 18 U.S.C. § 1014.

With respect to similar fraud statutes, which like § 1014 do not explicitly list materiality in the definition of the crime, this court has held that materiality is an element of proof. *See United States v. Adler*, 623 F.2d 1287 (8th Cir. 1980). In *Adler*, the defendant had been convicted on fourteen counts of willfully and knowingly making false statements on

[5] 18 U.S.C. § 1014 states that: "[w]hoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same . . . shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

claims submitted under the Medicaid and Medicare programs in violation of 18 U.S.C. § 1001 and four counts of willfully and knowingly making false claims under the same programs in violation of 18 U.S.C. § 287. Although neither statute lists materiality as an element of the crime,[6] this court held that materiality is an essential element of both statutes. *Adler*, 623 F.2d at 1291 n.5.

With respect to the § 1001 charge in *Adler*, this court stated, "[a]lthough 28 [sic] U.S.C. § 1001 on its face does not limit its coverage to those false statements which are material, it has been well established that materiality of the statement is an element of a violation of 18 U.S.C. § 1001. *United States v. Voorhees*, 593 F.2d 346 (8th Cir.), cert. denied, 441 U.S. 936, 99 S.Ct. 2061 (1979)." *Id.* at 1291. In regard to the § 287 charge, the court found that "[n]either appellant nor the government distinguishes between 18 U.S.C. § 1001 and 18 U.S.C. § 287 as far as the

[6] 18 U.S.C. § 1001 provides: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. § 287 provides: "Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

requirement of a showing that the false claim or false statement involved is material. Accordingly, we treat materiality as an essential element of both statutes. We see no reason to treat the statutes differently." *Id.* n.5.

Like 18 U.S.C. § 1001, the statute at issue in *Adler*, the statute at issue in this case, 18 U.S.C. § 1014, on its face does not limit its coverage to those false statements which are material. However, it has been well established that materiality of the statement is an element of a violation of 18 U.S.C. § 1014. *See United States v. Concemi*, 957 F.2d 942, 951 (1st Cir.); *United States v. Ryan*, 828 F.2d 1010, 1014 n.1 (3d Cir.); *United States v. Bonnette*, 663 F.2d 495, 496 (4th Cir.); *United States v. Thompson*, 811 F.2d 841, 843 (5th Cir.); *United States v. Spears*, 49 F.3d 1136 (6th Cir. 1995); *Theron v. United States Marshal*, 832 F.2d 492, 496 (9th Cir. 1987); *United States v. Smith*, 838 F.2d 436, 439 (10th Cir. 1988); *United States v. Rapp*, 871 F.2d 957, 964 (11th Cir. 1989). We see no reason to treat § 1014 any differently from the similarly worded §§ 287 and 1001. Therefore, we explicitly adopt the rule we have implicitly acknowledged before, that the "materiality" of a false statement is an element of proving a violation of § 1014. *See United States v. Ribaste*, 905 F.2d 1140 (8th Cir. 1990); *see also United States v. Garfinkle*, 29 F.3d 1253, 1256 (8th Cir. 1994); *United States v. McKnight*, 771 F.2d 388 (8th Cir. 1985); *United States v. Habib*, 594 F.2d 1215, 1216 (8th Cir. 1979) (defendants charged with making statements that were materially false under § 1014), *and see also*, *United States v. Mallen*, 843 F.2d 1096, 1102 (8th Cir. 1987); *United States v. Reeves* 674 F.2d 739, 747 (8th

Cir. 1982); *United States v. Segal*, 649 F.2d 599 (8th Cir. 1981) (indictments in § 1014 prosecutions alleged material false statements).

While conceding that most courts require proof of materiality to support a conviction under § 1014, the government argues that courts impose the requirement of proving materiality to exclude trifles from its coverage not as a statutorily required element of the crime. *See United States v. Corsino*, 812 F.2d 26, 30 (1st Cir. 1987); *see also Hughes v. United States*, 899 F.2d 1495 (6th Cir. 1990); *United States v. Keefer*, 799 F.2d 1115 (6th Cir. 1986); *United States v. Abadi*, 706 F.2d 178 (6th Cir. 1983); *United States v. Beer*, 518 F.2d 168, 170 (5th Cir. 1975). In *Beer*, for example, the court stated that:

> "[w]hen dealing with a pervasive, all-encompassing statute, however, the courts must be extremely careful to insure that reasonable limits are observed. This is merely a restatement of the canon of construction that criminal statutes are to be strictly construed. [citations omitted] In order to exclude 'trivial' falsehoods from the purview of the statute, the courts have read a requirement of materiality into its second clause . . . ."

Beer, 518 F.2d at 171. The fact that courts resort to canons of statutory construction to determine that statutes like § 1014 require proof of materiality, however, does not alter our conclusion that proof of materiality is a statutorily required element of the crime.

The primary objective of statutory construction is to determine legislative intent. *United States v.*

Jones, 811 F.2d 444, 447 (8th Cir. 1987). While it is the function of the legislature to make the laws, it is the function of the courts to finally and authoritatively interpret what the law says. *Sutherland Stat. Const.* § 45.03 (5th Ed). In this case, we construe § 1014 to require proof of the materiality of a false statement.

Because the statute requires proof of the materiality of a false statement, materiality is an element of § 1014. *Gaudin*, therefore, dictates that we vacate the defendants' convictions on both counts I and II and remand the case to the district court for retrial. The trial court's determination of materiality as a matter of law denied the defendants' constitutional right to have a jury determine each and every element of a charged crime, including the materiality of a false statement charged under § 1014 and under the § 371 charge of a conspiracy to violate § 1014.

B. Violation of 18 U.S.C. § 1014 — Count I

The appellants argue that Count I does not allege a violation of 18 U.S.C. § 1014 and that the court erred in not granting their motions for judgment of acquittal, arrest of judgment, and new trial. Since we are remanding for a new trial because of *Gaudin*, we need only address the judgment of acquittal and arrest of judgment issues.

Count I alleges a conspiracy to make false statements to financial institutions by agreement to avoid telling the banks about Copytech's financial responsibility to service the copiers under the CMP contracts. The appellants claim that withholding

information cannot support a conviction under § 1014, only affirmative assertions of facts can. We disagree.

Other courts have broadly interpreted § 1014 to cover various types of acts and misrepresentations as statements. *See, e.g., United States v. Haddock*, 956 F.2d 1534 (10th Cir. 1992) (evidence that defendant failed to disclose line of credit sufficient to convict under § 1014); *United States v. Trexler*, 474 F.2d 369, 370-71 (5th Cir.) (in a § 1014 prosecution, the jury could consider what "a defendant does or fails to do", it is not limited to affirmative acts); *United States v. Sackett*, 598 F.2d 739, 740-42 (2d Cir. 1979) (in § 1014 prosecution, there was sufficient evidence for the jury to convict for omitting information orally on loan application); *United States v. Trice*, 823 F.2d 80 (5th Cir. 1987) (failure to disclose material information needed to avoid deception in connection with loan transactions covered by § 1014 constitutes a false statement or report within the meaning of the statute and thus violates the statute); *United States v. Ryan*, 828 F.2d 1010, 1017 (3d Cir. 1987) (fact that a word was not spoken or written does not necessarily mean that a message was not sent and received; under § 1014 a statement included assertive "nonverbal conduct"); *United States v. Concemi*, 957 F.2d 942, 959-61 (1st Cir. 1992) (HUD-1 certificates which omit information about second mortgage constitute "statement" for § 1014 purposes).

Likewise, in construing a similar statute, we have recognized that an omission in a § 1005 prosecution can constitute a "false entry" where an honest entry would otherwise be made. *See United States v. Copple*, 827 F.2d 1182, 1187 (8th Cir. 1987). The defendant in *Copple* was prosecuted under 18 U.S.C.

§ 1005 for making false entries in a bank book, report or statement. The defendant argued that the evidence was not sufficient to support a § 1005 charge because there could not have been a false entry made where the false documents were withheld, rather than entered. We held, *citing United States v. Dougherty*, 763 F.2d 970, 973 (8th Cir. 1985), that an omission could constitute a false entry, where an honest entry would otherwise be made.

In this case, Count I charges that the appellants conspired to violate § 1014 by knowingly omitting material information for the purpose of influencing federally insured financial institutions. As in *Copple*, such omissions may constitute a false statement where honest statements would otherwise be made. The literal truth of information that is actually submitted does not shield the intentional omission of material information from prosecution under § 1014. The allegations contained in Count I of the indictment are sufficient to allege a violation of 18 U.S.C. § 1014.

C. Sufficiency of Evidence

The defendants argue that the evidence produced at trial, as to both Counts I and II, was legally insufficient to prove guilt beyond a reasonable doubt as to each and every element of both counts. As to Count I, the defendants claim that the evidence does not support a finding that they intended to influence the banks. As to Count II, they argue that the evidence does not support a finding that they did not have the authority to sign their wives signatures. As to both counts, they claim that the evidence does not support a finding that the false statements were "material".

Consequently, they claim that the Court violated their Fifth Amendment right to due process by denying their motions for judgment of acquittal, arrest of judgment and new trial. Again, since we are remanding for a new trial on other grounds, we need only address whether the motion for judgment of acquittal or arrest of judgment should have been granted.

In reviewing the denial of a motion for judgment of acquittal, the evidence is viewed in the light most favorable to the government, resolving evidentiary conflicts in favor of the government, and accepting as established all reasonable inferences which may be logically drawn from the evidence. *United States v. Springer*, 831 F.2d 781, 783-84 (8th Cir. 1987), *cert. denied*, 485 U.S. 938 (1988); *United States v. Rodriguez*, 812 F.2d 414, 416 (8th Cir. 1987). A motion for judgment of acquittal should be granted only where the evidence is such that a reasonably minded jury must have a reasonable doubt as to the existence of one of the essential elements of the crime charged. The court can neither weigh the evidence nor assess the credibility of the witnesses. *Burks v. United States*, 437 U.S. 1, 16 (1978). Determining the credibility of witnesses is the jury's function.

Application of that standard to the record in this case leads us to the conclusion that there was more than sufficient evidence to support each defendant's conviction on each element of both Counts I and II. Mr. Russell, the third co-defendant in this case testified against both Wells and Steele on each count. Since his testimony is not incredible or insubstantial on its face, it is sufficient to sustain a conviction on both counts. *See United States v. Drews*, 877 F.2d 10,

13 (8th Cir. 1989) (The uncorroborated testimony of an accomplice is sufficient to sustain a conviction if the testimony is not incredible or insubstantial on its face.). In addition, the evidence of the timing of the evolution of the CMP contract language supports an inference of intent as to Count I. Evidence that the defendants did not sign their own wives' names to the loan guarantees supports both an inference that they did not have the authority to sign their wives names as they claim and that they intended to submit false signatures and influence the bank.

The defendants argue that neither the withholding of the information alleged in Count I nor their wives' signatures on personal loan guarantees were material because there was some evidence that bank officers would not have relied on the information. Reliance, however, is not necessary to make out a violation of § 1014. *United States v. Copple*, 827 F.2d 1182, 1187 (8th Cir. 1987). The crime is one of subjective intent, it is enough that the statement has the capacity of influencing the financial institution. *United States v. Glassey*, 715 F.2d 352 (7th Cir. 1983); *United States v. Bonnette*, 663 F.2d 495 (4th Cir. 1981). In this case, the evidence that Boatmen's and Norwest required reserve accounts as a precondition to financing the CMP leases is sufficient to support a finding that the withheld information was material, or in other words, had the capacity to influence the financial institutions. The fact that O'Bannon Bank asked the defendants to have their wives sign unconditional loan guarantees supports a reasonable inference that personal loan guarantees from the defendants' spouses would have the capacity of influencing the bank.

D. Expert Testimony

The defendants also challenge the court's exclusion of expert testimony on the issues of whether the revised copier lease contracts and their coordinate CMP addenda were, together, part of the same lease and whether the false statements were material. As the expert's proffered testimony amounted to instructing the jury on the law, the court's exclusion of the evidence was not manifestly erroneous. *See, e.g., Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988), *cert. denied*, 488 U.S. 1008 (1989); *United States v. DiDomenico*, 985 F.2d 1159, 1164 (2d Cir. 1993) (instruction on the law is the function of the court, not a defense expert). We do not reach the question of whether the court's refusal to admit expert evidence on the issue of materiality was erroneous because we are remanding the case for retrial on other grounds. However, we note that the admissibility of expert evidence on the issue of the materiality of false statements should be determined in light of our holding above that materiality is an issue for the jury.

III. Multiple Conspiracy and Sentencing Errors

Appellants appeal the trial court's decision to not give a multiple conspiracy instruction. Because we reverse the defendants' convictions and remand for new trial, we do not reach the issue of whether the evidence at a new trial will require a multiple conspiracy instruction. Likewise, we do not decide the sentencing issues raised by the government in its cross-appeal.

IV. Conclusion

We hold that proof of the materiality of an alleged false statement is required as an element of proving a violation of 18 U.S.C. § 1014. The trial court in this case denied the appellants' constitutional right to have a jury deliberate on each and every element of proof of the charged crimes by instructing the jury that they were not to deliberate on the materiality of the false statements underlying both Counts I and II because the statements were material as a matter of law. Since the evidence was otherwise sufficient to support a conviction and overcome the defendants' motions for judgment of acquittal, we vacate the convictions and remand to the district court for retrial consistent with this order.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 93-3924, 93-3932, and 94-1031

UNITED STATES OF AMERICA, APPELLEE,

v.

JERRY E. WELLS, ET AL., APPELLANTS,

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 2, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals , Eighth Circuit

APPENDIX C

INSTRUCTION NO. 20

The crime of making a false statement to a bank as charged in Count Two of the Indictment has three essential elements which are:

First: That O'Bannon Bank was federally insured;

Second: That the defendant knowingly made or caused to be made a false statement to the bank, that is, by submitting the forged unconditional personal guaranties of their spouses;

Third: That the defendants did so for the purpose of convincing the bank to purchase lease contracts.

It is not necessary, however, to prove that the institution involved was, in fact, influenced or misled. What must be proven is that the defendant intended to influence the bank by the false statement.

A statement or representation is "false" when it is untrue when made or effectively conceals a material fact. A material fact is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction.

An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake or accident. The government is not required to prove that the defendant knew that his acts or omissions were unlawful. You make consider evi-dence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

The materiality of the statement or representation alleged to be false or concealed is not a matter with which you are concerned and should not be considered

by you in determining the guilt or innocence of the defendant.

To make a false statement to a federally insured bank, the defendant need not directly submit the false statement to the institution. It is sufficient if the defendant submits the statement to a third party knowing that the third party will submit the false statement to the federally insured bank.

For you to find a defendant guilty of the crime charged under Count Two, the government must prove all of the essential elements beyond a reasonable doubt as to that defendant; otherwise you must find that particular defendant not guilty of this crime under Count Two.

Supreme Court, U.S.
FILED
MAR 4 1996
CLERK

(2)

No. 95-1228

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

JERRY E. WELLS
and
KENNETH R. STEELE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

JAMES R. WYRSCH
(Counsel of Record)
W. BRIAN GADDY
WYRSCH ATWELL MIRAKIAN
LEE & HOBBS, P.C.
1101 Walnut Street, Suite 1300
Kansas City, MO 64106-2122
(816) 221-0080
Attorneys for Respondents

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QUESTIONS PRESENTED

I. WHETHER THE GOVERNMENT IS PRECLUDED FROM RAISING ITS ARGUMENT THAT MATERIALITY IS NOT AN ELEMENT OF 18 U.S.C. § 1014 WHEN THE INDICTMENT IN THIS CASE CHARGES MATERIALITY AS AN ELEMENT OF THE OFFENSE, THE JURY INSTRUCTIONS OFFERED BY THE GOVERNMENT AND SUBMITTED TO THE JURY INCLUDED THE ELEMENT OF MATERIALITY, AND THE GOVERNMENT DID NOT OBJECT OR OTHERWISE SUBMIT TO THE DISTRICT COURT THAT MATERIALITY IS NOT AN ELEMENT OF SECTION 1014.

II. WHETHER THE COURT OF APPEALS BELOW ERRED IN RECOGNIZING THAT MATERIALITY IS AN ESSENTIAL ELEMENT OF 18 U.S.C. § 1014 AND IS A QUESTION FOR THE JURY TO DETERMINE IN LIGHT OF THIS COURT'S RECENT DECISION IN *UNITED STATES v. GAUDIN*, 115 S. CT. 2310 (1995).

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 2

JURISDICTION 2

STATUTORY PROVISION INVOLVED 2

STATEMENT 2

REASONS FOR DENYING THE PETITION 8

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases:

Daughtry v. United States,
116 S. Ct. 510 (1995) 10

Gatewood v. United States,
116 S. Ct. 510 (1995) 10

Griffin v. United States,
112 S. Ct. 466, 473 n.2 (1981) 7

Kay v. United States,
303 U.S. 1 (1938) 12, 13

Knapp v. United States,
116 S. Ct. 666 (1995) 10

Pembaur v. City of Cincinnati,
882 F.2d 1101, 1106 (6th Cir. 1989) 8

Porat v. United States,
115 S. Ct. 2604 (1995) 10

Staples v. United States,
114 S. Ct. 1793 (1993) 12

Steagald v. United States,
451 U.S. 204 (1981) 8

Stirone v. United States,
361 U.S. 212 (1960) 7

United States v. Burson,
952 F.2d 1196 (10th Cir. 1991),
cert. denied, 503 U.S. 997 (1992) 7

United States v. Camp,
541 F.2d 737 (8th Cir. 1976)
(*citing Ex Parte Bain*, 121 U.S. 1 (1887) 7, 8

United States v. Carr,
965 F.2d 408 (7th Cir. 1992) 8

United States v. Cleary,
565 F.2d 43 (2d Cir. 1977),
cert. denied, 435 U.S. 915 (1978) 11

United States v. Gaudin,
115 S. Ct. 2310 (1995) ..... i, 1, 5, 8-10

United States v. Johnson,
26 F.3d 669 (7th Cir. 1994),
cert. denied, 115 S. Ct. 344 (1995) 7

United States v. Lopez,
71 F.3d 954 (1st Cir. 1995) 7, 10

United States v. Morales,
737 F.2d 761 (8th Cir. 1984) 8

United States v. Ryan,
828 F.2d 1010 (3rd Cir. 1987) 10

United States v. Sabatino,
485 F.2d 540, 574 (2d Cir. 1973) 11

United States v. Sharpe,
996 F.2d 125 (6th Cir. 1993),
cert. denied, 114 S. Ct. 400 (1993) 7

United States v. Schnurstein,
977 F.2d 449 (8th Cir. 1992) 7

United States v. Spears,
49 F.3d 1136 (6th Cir. 1993) 10

United States v. Staniforth,
971 F.2d 1355 (7th Cir. 1992) 12

United States v. Thompson,
811 F.2d 841 (5th Cir. 1987) 8

United States v. Ward,
914 F.2d 1340 (9th Cir. 1990) 7

Waldron v. United States,
116 S. Ct. 333 (1995) 10

Statutes:

18 U.S.C. § 1001 ..... 9, 11

18 U.S.C. § 1014 ..... i, 1, 3-13

18 U.S.C. § 3553(e) 3

18 U.S.C. § 371 1

U.S.S.G. § 5K1.1 3

No. 95-1228

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

JERRY E. WELLS
and
KENNETH R. STEELE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

Respondents Jerry E. Wells and Kenneth R. Steele oppose the United States' Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The Respondents accept the Petitioner's version of the Opinion Below as set forth in the Petition for a Writ of Certiorari.

JURISDICTION

The Respondents accept the Petitioner's version of Jurisdiction as set forth in the Petition for a Writ of Certiorari.

STATUTORY PROVISION INVOLVED

The Respondents accept the Petitioner's version of the statutory provision involved as set forth in the Petition for a Writ of Certiorari.

STATEMENT

The Respondents in this case were each charged by Indictment in the United States District Court for the Western District of Missouri with one count of conspiracy to make material false statements to a financial institution in violation of 18 U.S.C. § 371, and four counts of making material false statements to financial institutions in violation of 18 U.S.C. § 1014. Defendants pleaded not guilty to all charges. Before the trial in this cause, one false statement count was dismissed by the district court for failure to state an offense. Following the close of all the evidence, the district court granted judgments of acquittal on two other false statement counts.

After its deliberations, the jury returned verdicts of guilty on the conspiracy to make false statements to a financial institution count and on the remaining false statement count. Each Respondent was sentenced to a term of two years probation. On appellate review, the Eighth Circuit Court of Appeals vacated the convictions and remanded the case for retrial in light of *United States v. Gaudin*, 115 S. Ct. 2310 (1995).

This case involved a photocopier sales, service, and leasing company that was purchased and owned by the Respondents and James Russell. After the purchase of this company, the Respondents and Russell renamed the company Copytech. Respondent Wells was chairman of the board and secretary of Copytech, and Respondent Steele was the CEO and vice president. James Russell had numerous years experience in the photocopy industry, and was responsible for the day-to-day operations of the business. Neither Respondent Wells nor Respondent Steele had any experience in the sales, leasing, or service of photocopier systems. Both Respondents initially relied on Russell to make all major business decisions regarding the company and its day-to-day operations. However, the Respondents became more actively involved in the company when Russell became emotionally disturbed and ill.

While working at the predecessor company to Copytech, Russell became familiar with a copier program that allowed the equipment, supplies, and service to be paid for by customers in one monthly payment. This program, called Copier Management Program or CMP, was also utilized by Copytech. To obtain funding due to a cash flow problem, Copytech obtained financing by selling its rights to the income under the lease agreements, but not its liabilities, to financial institutions.

The government's theory at trial was that the Respondents and James Russell conspired to withhold and conceal the fact that CMP was part of the lease contracts that were being purchased by financial institutions. The government's theory was that Copytech did not disclose its service obligations under the CMP agreement to the banks. Three overt acts were submitted to the jury. One of those acts alleged that the Respondents made false statements to banks by providing the banks with lease contracts that contained provisions that maintenance was the responsibility of the lessee and did not disclose its obligations under the CMP schedules. The second overt act alleged that James Russell made similar false statements to banks. The third overt act alleged that the Respondents had signed their wives' names to personal

guaranties to influence the bank in purchasing lease contracts. This overt act was also the substantive false statement count charged in Count II.

The government's evidence regarding the conspiracy rested almost entirely on the testimony of James Russell. Russell testified pursuant to a plea agreement he had previously entered into with the government wherein he pled guilty to three counts of bank fraud and conspiracy to commit bank fraud. Pursuant to the agreement, the government agreed to consider filing a motion for downward departure under U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) for his substantial assistance in rendering testimony against the Respondents in this case.

Russell testified at trial that some banks wanted Copytech to keep a reserve fund to cover "soft costs" (costs to service equipment over and above equipment costs). Russell testified that prior to the purchase of Copytech and immediately thereafter, the company used separate lease contracts and separate CMP agreements. The lease contract did not reference the CMP agreement. However, Russell's testimony indicated that officials from one of the financial institutions involved in this case were provided an overview of CMP and even inspected lease files with CMP agreements included in those files. In addition, Copytech provided financial statements to the banks involved that contained an extensive description of its CMP program.

Russell testified that, to avoid the "soft costs" reserve, Copytech altered its lease agreement to state that the lessee was responsible for maintenance and then the CMP agreement would be added as an addenda. Only the lease would be sent to the financial institutions. The Respondents at trial submitted, *inter alia*, that the omission of the CMP agreement was not material.

The Respondents were also convicted of violating 18 U.S.C. § 1014 by signing their wives' names to personal

guaranties.[1] At trial, the Respondents claimed that the statements were not false because they had or believed they had their wives' authority and because the signatures were not material. The issue of materiality was a critical aspect of both counts submitted to the jury.

After all the evidence was adduced at trial, the district court ruled that the remaining false statements in question were material. At this time, the Respondents argued that materiality should be an issue submitted to the jury.[2] Thus, this issue was properly preserved by the Respondents. *(See* Petitioners' App. at 7a n.3.) When the district judge ruled on materiality issues, the government did not argue, suggest or submit that materiality is not an essential element of 18 U.S.C. § 1014.

The Respondents appealed their convictions to the Eighth Circuit and the government cross-appealed on several sentencing issues. In its initial brief on appeal, the government did not raise the issue that materiality is not an element of 18 U.S.C. § 1014. The government consistently acknowledged in its brief that materiality is an element of § 1014; that the government met its burden at trial of proving that the statements at issue were material; and that the district judge acted appropriately in ruling that those statements were material.

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1. The evidence at trial through the testimony of James Hayes, former chairman of O'Bannon Bank, indicated that Regulation B of the Code of Banking Regulations prohibited financial institutions from requiring the signature of an applicant's spouse other than on a joint application for credit transaction.

2. In ruling on the issue of materiality, the district court judge was also of the opinion that materiality should be submitted to the jury (Petitioners' App. at 8a, n.4). However, the judge felt bound by then-controlling Eighth Circuit law which required him to determine materiality. (*Id.*)

During the pendency of the appeal to the Eighth Circuit, this Court handed down the decision of *United States v. Gaudin*, 115 S. Ct. 2310 (1995). In light of *Gaudin*, the Eighth Circuit requested supplemental briefing by the parties. Only after this Court's decision in *Gaudin* and the Eighth Circuit's request for additional briefing did the government raise its argument that materiality is not an essential element of 18 U.S.C. § 1014.

In its decision below, the Eighth Circuit correctly recognized that materiality has been held to be an element of Section 1014 by most courts, and has traditionally been a matter of law for the judge to decide (Petitioners' App. at 7a). Since the court held that materiality was an element of Section 1014, the Eighth Circuit reversed and remanded this case in light of the *Gaudin* decision which requires that materiality should be submitted to the jury.

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REASONS FOR DENYING THE PETITION

I. WHETHER THE GOVERNMENT IS PRECLUDED FROM RAISING ITS ARGUMENT THAT MATERIALITY IS NOT AN ELEMENT OF 18 U.S.C. § 1014 WHEN THE INDICTMENT IN THIS CASE CHARGED MATERIALITY AS AN ELEMENT OF THE OFFENSE, THE JURY INSTRUCTIONS OFFERED BY THE GOVERNMENT AND SUBMITTED TO THE JURY INCLUDED THE ELEMENT OF MATERIALITY, AND THE GOVERNMENT DID NOT OBJECT OR OTHERWISE SUBMIT TO THE DISTRICT COURT THAT MATERIALITY IS NOT AN ELEMENT OF SECTION 1014.

The Indictment in this case charged materiality as an element of the false statement charge in Count II.[3] Furthermore, Jury Instruction 20, which was offered by the government and submitted to the jury, contains a definition of when a statement is false that includes materiality.[4] The instruction goes on to state that materiality is not a matter for the jury to determine (Petitioner's App. at 22a). In addition, Instructions 15 (the conspiracy instruction) and 18 (defined false statements for conspiracy) reference materiality.[5] The

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3. Count II charged in relevant part: "[D]efendants Jerry E. Wells and Kenneth R. Steele knowingly made and caused to be made false statements of *material fact* to O'Bannon Bank . . ." (emphasis added).

4. Instruction 20 stated in relevant part: "A statement or representation is 'false' when it is untrue when made or effectively conceals a *material* fact. A material fact is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction." (Petitioner's App. at 22a.)

5. The conspiracy instructions included several references to materiality, but the substantive false statement instruction told the jury to disregard the issue of materiality. This also created error because the object

Indictment and the jury instructions were consistent with the well-established law that § 1014 requires a false statement of *material fact*. *See, e.g., United States v. Lopez*, 71 F.3d 954, 960 (1st Cir. 1995) (Section 1014 requires that the false statement regard a material fact).

Since the Indictment in this case charged materiality as an element of the offense and the government's instructions also contained materiality, the government is precluded by the "invited error" doctrine from claiming that materiality is not an element of § 1014. Under the invited error doctrine, a party is precluded from arguing on appeal those errors which he invited or provoked the court below to commit. *See, e.g., United States v. Sharpe*, 996 F.2d 125 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 400 (1993); *United States v. Schnurstein*, 977 F.2d 449 (8th Cir. 1992); *United States v. Burson*, 952 F.2d 1196 (10th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992); *United States v. Ward*, 914 F.2d 1340 (9th Cir. 1990). Under this doctrine, the government cannot charge materiality in the Indictment, offer instructions that include materiality and then argue to this Court that it is entitled to relief on the materiality issue. *See also United States v. Johnson*, 26 F.3d 669 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 344 (1995).

Additionally, since the grand jury charged materiality as an element of the offenses in the Indictment, the government was required to prove materiality in this particular case. *Cf. United States v. Camp*, 541 F.2d 737, 740 (8th Cir. 1976) (citing *Ex Parte Bain*, 121 U.S. 1 (1887); *Stirone v. United States*, 361 U.S. 212 (1960). In *Camp*, the Eighth Circuit stated that the defendant has a constitutional right to be tried upon charges found by a grand jury. *Id.* The words of the Indictment evidence whether the grand jury considered and included the essential element of materiality. *Cf. Camp*, 541 F.2d at 740. In this particular case, the grand jury considered and included

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though materiality was referenced in the conspiracy instructions. *See Griffin v. United States*, 112 S. Ct. 466, 473 n.2 (1981) (citing *United States v. Irwin*, 654 F.2d 671 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982)).

essential element of materiality. *Cf. Camp*, 541 F.2d at 740. In this particular case, the grand jury considered and included materiality as an element of the offenses charged and thus, the government is precluded from raising the argument that materiality is not an element.

In addition to the Indictment and jury instructions, the government failed to make any objection or record submitting that materiality should not be an issue or element under 18 U.S.C. § 1014 when the court was ruling on the issue of materiality. Plus, the government's initial brief on appeal consistently alleges materiality is an element of 18 U.S.C. § 1014; was properly proved at trial; and that the judge acted appropriately in holding that the statements were material. Once the Eighth Circuit requested additional briefs in light of *Gaudin*, the government took its contrary position regarding materiality. To raise its argument regarding materiality at this stage of the proceedings went well beyond what the Eighth Circuit requested in the additional briefs that were allowed.

A principle rule of appellate procedure is that when a litigant fails to raise a challenge timely, or concedes an issue below, it cannot be raised in later proceedings. *See, e.g., Steagald v. United States*, 451 U.S. 204, 208-09 (1981); *Pembaur v. City of Cincinnati*, 882 F.2d 1101, 1106 (6th Cir. 1989); *United States v. Morales*, 737 F.2d 761, 763 (8th Cir. 1984). Counsel cannot remain silent, let the claimed error take place, and then object to the error later. *United States v. Carr*, 965 F.2d 408 (7th Cir. 1992). *See also United States v. Thompson*, 811 F.2d 841, 843 (5th Cir. 1987) (jury instruction that contained materiality in a § 1014 prosecution was permissible because materiality has been recognized as an element, and the government did not object to the jury instruction). The government below had ample opportunity to present its argument regarding materiality. Additionally, the government had the opportunity to discuss this issue in its initial brief before the appellate court. The government should not now be able to take a contrary position.

II. WHETHER THE COURT OF APPEALS BELOW ERRED IN RECOGNIZING THAT MATERIALITY IS AN ESSENTIAL ELEMENT OF 18 U.S.C. § 1014 AND IS A QUESTION FOR THE JURY TO DETERMINE IN LIGHT OF THIS COURT'S RECENT DECISION IN *UNITED STATES v. GAUDIN*, 115 S. CT. 2310 (1995).

The Petition should also be denied because the opinion below, upon which the Respondents rely, is consistent with this Court's holding in *Gaudin* and its actions in subsequent cases. The *Gaudin* decision involved 18 U.S.C. § 1001, which criminalizes making material false statements in a matter within the jurisdiction of a federal agency.[6] The parties in the *Gaudin* case agreed that materiality was an element of the offense under § 1001 in light of the well-established case law construing § 1001. *See Gaudin*, 115 S. Ct. at 2313.[7] The issue addressed by this Court was whether the jury or the judge should determine materiality.

This Court held that criminal convictions must rest on a jury determination that the defendant is guilty of every element of the crime beyond a reasonable doubt. *Gaudin*, 115 S. Ct. at 2313. Justice Scalia wrote that a defendant's Sixth Amendment right to a jury trial mandates that the jury determine

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6. 18 U.S.C. § 1001 provides: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both."

7. It should be noted that while the first phrase creating a violation of § 1001 uses the word "material" as an adjective to qualify the word "fact," "material" is not used in the second phrase creating a violation of § 1001. The statutory language which identifies a violation of § 1014 parallels the language of the second phrase of § 1001.

whether the element of materiality has been established. *Id.* Thus, *Gaudin* requires that materiality under Section 1001 must be submitted to the jury. After the *Gaudin* decision, this Court has granted certiorari, vacated the judgment, and remanded several cases for further consideration in light of *Gaudin*. *See, e.g.*, *Knapp v. United States*, 116 S. Ct. 666 (1995) (conviction involving the filing of false currency transaction reports was remanded in light of *Gaudin); Daughtry v. United States*, 116 S. Ct. 510 (1995); *Gatewood v. United States*, 116 S. Ct. 510 (1995) (conviction for making a false statement to the Navy was remanded in light of *Gaudin*); *Waldron v. United States*, 116 S. Ct. 333 (1995) (conviction under 18 U.S.C. § 1014 for making a false statement to HUD was remanded in light of *Gaudin*); *Porat v. United States*, 115 S. Ct. 2604 (1995) (conviction under 18 U.S.C. § 1623, which prohibits making a false declaration before the grand jury, was remanded in light of *Gaudin*). The *Waldron* case involved the same statute involved in this case, 18 U.S.C. § 1014.

In the decision below, the Court of Appeals correctly recognized that materiality has long been recognized as an element under 18 U.S.C. § 1014 (Petitioner's App. at 12a). *See also United States v. Lopez*, 71 F.3d 954, 960 (1st Cir. 1995) (Section 1014 requires that the false statement concern a material fact); *United States v. Spears*, 49 F.3d 1136, 1141 (6th Cir. 1993) (the government must prove that the defendant knowingly made a false statement of material fact); *United States v. Ryan*, 828 F.2d 1010, 1013-14 (3rd Cir. 1987). Moreover, the Eighth Circuit recognized that similar fraud statutes like 1014, which do not explicitly list materiality in the definition of the crime, nevertheless have been found to require materiality as an element of proof. *See* Petitioner's App. at 10a (*citing United States v. Adler*, 623 F.2d 1287 (8th Cir. 1980).[8]

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8. In *Adler*, the court held that although 18 U.S.C. § 1001 does not on its face limit its coverage to false statements which are material, materiality is an element of the offense. *United States v. Adler*, 623 F.2d 1278, 1291 (8th Cir. 1980). Further, the *Adler* court stated that it saw no reason to treat Section 1001 any differently than 18 U.S.C. § 287. *Id.*

The Eighth Circuit below saw no reason to treat Section 1014 differently than similarly worded false statement statutes, like § 1001 (Petitioner's App. at 12a). Thus, the Eighth Circuit has explicitly adopted the rule that numerous other courts have previously adopted, materiality is an essential element of § 1014. *Id.*

The government asserts in its Petition that there is a "long-standing conflict between the circuits" regarding materiality as an essential element of 18 U.S.C. § 1014 (Petition at 8). Yet, the only case cited in the government's Petition in support of its argument is the 1977 Second Circuit opinion of *United States v. Cleary*, 565 F.2d 43, 46 (2d Cir. 1977), *cert. denied*, 435 U.S. 915 (1978). The *Cleary* decision rejected an argument on appeal that the trial court erred in failing to instruct the jury that the statements made were false as to a material matter. *Cleary*, 565 F.2d at 46. In its decision, the *Cleary* court quoted a previous Second Circuit decision which had rejected the argument that reliance by the bank on the statements is an element under Section 1014. *United States v. Sabatino*, 485 F.2d 540, 574 (2d Cir. 1973). The *Cleary* court quoted *Sabatino* by stating that "[i]t does not lie with one knowingly making false statements . . . to say that the statements were not influential or the information not important." *Cleary*, 565 F.2d at 46 (*quoting Sabatino*, 485 F.2d at 574). The opinion goes on to state that "[i]n any event, any question of materiality would be for the court, not the jury." *Cleary*, 565 F.2d at 46. Thus, the Second Circuit was undecided as to whether materiality should not be an element of Section 1014, or whether materiality is an element but should be determined by the court.

As acknowledged in the government's Petition, nearly all other circuits have held that materiality is an essential element of § 1014 (Petition at 12). Respondents respectfully submit that in light of the fact *Cleary* was decided some time ago, coupled with the fact that the *Cleary* opinion is not clearly decisive as to this issue, there is no "long-standing" or substantial conflict among the circuits regarding the issue of materiality.

The government also argues that the provision of § 1014, which requires that the statement be made "for the purpose of influencing in any way the actions" of a covered institution, somehow forecloses or precludes a materiality requirement. The government states that if statements are made for the purpose of influencing actions of a covered institution, the statements must be material because immaterial statements would not influence the banks. Thus, the government concedes materiality is an element of the offense, but still argues materiality qualifies "purpose of influencing" but not the statements themselves. How can that be? The "purpose of influencing" language in § 1014 places emphasis on the defendant's intent, while materiality looks to the actual statements made. It is possible that a defendant could make a trivial or harmless statement with the purpose or intent to influence the bank's decision. The importance of this distinction was discussed in *United States v. Staniforth*, 971 F.2d 1355 (7th Cir. 1992). Writing for the Seventh Circuit, Judge Posner determined that materiality prevents the statute from punishing harmless or trivial attempts. *See Staniforth*, 971 F.2d at 1358. Without materiality, Judge Posner felt that the potential reach of § 1014 would be greatly expanded with few benefits. *Id.* Such an expansion of § 1014, without materiality, would lead to unnecessary litigation for trivial or immaterial statements made, and would violate the interests of justice. The Seventh Circuit, along with most other federal circuits, recognize the importance of the materiality requirement. Further, these courts recognize that although materiality is not explicitly listed in the various fraud statutes, it is not error for courts to require materiality as an element of proof. *See, e.g., Staples v. United States*, 114 S. Ct. 1793 (1993).

Finally, the government's reliance on *Kay v. United States*, 303 U.S. 1 (1938), is misplaced. *Kay* involved a predecessor statute to § 1014, 12 U.S.C. § 1467(a) (1933), which prohibited making a false statement or willfully overvaluing any security for the purpose of influencing the Home Owner's Loan Corporation. *See Kay*, 303 U.S. at 3 n.1. In *Kay*, the petitioner argued that the statements would not have directly influenced any loan made by the corporation. This

Court held that one charged with making a false statement cannot claim that statements were not influential or the information not important. *Kay*, 303 U.S. at 5-6. However, the *Kay* decision was pronounced in 1938 and involved a different statute. Further, at the time of the *Kay* opinion, there was not a breadth of case law from nearly all circuits analyzing and specifically adopting materiality as an important and necessary element of 18 U.S.C. § 1014.

The government has not demonstrated that there is an articulable or substantial conflict among the circuits regarding materiality. Additionally, the government is precluded from raising this issue at this stage in the proceedings. Thus, no reason exists for this Court to grant the Petition for a Writ of Certiorari in this case.

CONCLUSION

For the reasons set forth herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
JAMES R. WYRSCH
(Counsel of Record)
W. BRIAN GADDY
WYRSCH ATWELL MIRAKIAN
LEE & HOBBS, P.C.
1101 Walnut Street, Suite 1300
Kansas City, MO 64106-2122
(816) 221-0080
Attorneys for Respondents

Supreme Court, U.S.
FILED
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No. 95-1228

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

JERRY E. WELLS AND KENNETH R. STEELE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

8pp

TABLE OF AUTHORITIES

Cases:	Page
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	4
Ford v. *United States*, 273 U.S. 593 (1927)	4
Stevens v. *Department of Treasury*, 500 U.S. 1 (1991)	2
Stirone v. *United States*, 361 U.S. 212 (1960)	5
United States v. *Alzanki*, 54 F.3d 994 (1st Cir. 1995), cert. denied, 116 S. Ct. 909 (1996)	4
United States v. *Blake*, 941 F.2d 334 (5th Cir. 1991), cert. denied, 506 U.S. 998 (1992)	4
United States v. *Camp*, 541 F.2d 737 (8th Cir. 1976)	5
United States v. *Gaudin*, 115 S. Ct. 2310 (1995)	2, 3, 5, 6
United States v. *Miller*, 471 U.S. 130 (1985)	4
United States v. *Restrepo-Contreras*, 942 F.2d 96 (1st Cir. 1991), cert. denied, 502 U.S. 1066 (1992)	4
United States v. *Ribaste*, 905 F.2d 1140 (8th Cir. 1990)	2
United States v. *Sharpe*, 996 F.2d 125 (6th Cir.), cert. denied, 114 S. Ct. 400 (1993)	4
United States v. *Williams*, 504 U.S. 36 (1992)	2
Virginia Barkshares Inc. v. *Sandberg*, 501 U.S. 1083 (1991)	2
Waldron v. *United States*, 115 S. Ct. 2504 (1995)	5
Statutes:	
18 U.S.C. 1001	5
18 U.S.C. 1014	1, 2, 3, 4, 5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1228

UNITED STATES OF AMERICA, PETITIONER

v.

JERRY E. WELLS AND KENNETH R. STEELE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Our petition presents the question whether the materiality of the false statement or report is an element of 18 U.S.C. 1014, which imposes criminal penalties on a person who "knowingly makes any false statement or report * * * for the purpose of influencing in any way the action," *inter alia*, of a federally insured bank. Respondents claim (Br. in Opp. 6-8) that that question is not properly before this Court because the government did not raise it in a timely manner in the court of appeals. Rather, respondents note (*id.* at 5) that the government described respondents' false statements as material in the indictment in this case, and first argued that materiality was not an element of the Section 1014

offense after the court of appeals, on June 22, 1995, requested supplemental briefing regarding the effect of this Court's June 19, 1995, decision in *United States* v. *Gaudin*, 115 S. Ct. 2310.

As an initial matter, this Court's traditional rule "precludes a grant of certiorari only when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992). "That rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Ibid.*; see also *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). That rule is sensible, because when a court of appeals has announced a legal principle of general applicability, it has established governing law for future cases in its jurisdiction. A decision by such a court on an issue of law *is* fairly presented for review, whether or not it was "pressed" by a party. And there can be no doubt that the court of appeals in this case squarely decided the legal issue of whether materiality is an element of Section 1014 in a fashion that will bind courts in all Section 1014 prosecutions in the Eighth Circuit.

In any event, respondents' claim of untimeliness is without merit. As we discussed in our petition, before *Gaudin*, the question whether materiality was an element of Section 1014 was of little practical importance because, under the existing precedent in the Eighth Circuit and almost every other circuit, questions of materiality were decided by the trial judge, not the jury, and district judges routinely found the materiality element to have been established. Pet. 13-14; see *United States* v. *Ribaste*, 905 F.2d 1140, 1143 (8th Cir. 1990). The government accordingly did not have any occasion or need to contest the holding of the majority of courts of appeals that materiality was an element of the Section 1014 offense.

After respondents were convicted and appealed, the government again did not have occasion to raise that issue in its initial brief on appeal. Respondents, for their part, did not claim that it was error for the district court to resolve the materiality issue itself. See Respondents' Supplemental Letter Brief at 4 (July 5, 1995) ("because of the existing law in this circuit, the issue was not briefed" in respondents' opening and reply briefs).[1] Only after the court of appeals directed the parties to brief the effect of *Gaudin* did respondents raise that claim; the government properly replied that there was no error under *Gaudin*, because materiality is not an element of the Section 1014 offense. Thus, there was nothing untimely about the government's submission. Nor did the court of appeals suggest that it was untimely; the court, after receiving the supplemental briefs of the parties, addressed the issue and reversed respondents' convictions based on its holding that materiality is an element of the Section 1014 offense. See Pet. App. 10a-14a.

Respondents are also mistaken in claiming (Br. in Opp. 7) that under the "invited error" doctrine, the government may not assert that materiality is not an

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[1] Respondents' sole argument with regard to materiality in their initial court of appeals brief was that the evidence of materiality was insufficient. The government responded that respondents' false statements regarding their service obligations with customers and regarding their wives' personal loan guarantees were material to the banks' decisions to extend loans to them. The court of appeals agreed that those false statements were material. See Pet. App. 16a-18a.

element of Section 1014. That doctrine provides that a party "may not complain on appeal" of errors that the party itself invited or encouraged the trial court to commit. See *United States* v. *Sharpe*, 996 F.2d 125, 129 (6th Cir.), cert. denied, 114 S. Ct. 400 (1993). The government did not "complain on appeal," and does not now claim, that the trial court erred. It is respondents, not the government, who contend that the trial court erred by not submitting the issue of materiality to the jury. The government can defend the district court's judgment on the ground that materiality is not an element of the Section 1014 offense, because an appellate court may affirm a trial court's ruling on any ground apparent from the record. *United States* v. *Alzanki*, 54 F.3d 994, 1008 (1st Cir. 1995), cert. denied, 116 S. Ct. 909 (1996); *United States* v. *Blake*, 941 F.2d 334, 339 (5th Cir. 1991), cert. denied, 506 U.S. 998 (1992); see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 n.7 (1984).

Respondents, finally, err in relying (Br. in Opp. 6) on the fact that the indictment described respondents' false statements as material. The district court is not obliged to instruct the jury that, to convict, it must find each of the facts alleged in the indictment to have been established beyond a reasonable doubt. Rather, the district court is permitted to delete surplusage not essential to the charge, and "[a] part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as 'a useless averment' that 'may be ignored.'" *United States* v. *Miller*, 471 U.S. 130, 136 (1985), quoting *Ford* v. *United States*, 273 U.S. 593, 602 (1927); see *United States* v. *Restrepo-Contreras*, 942 F.2d 96, 98 (1st Cir. 1991) (where there was no statu-

tory requirement that the government establish as an element a defendant's specific intent as alleged in the indictment, no proof was required of that allegation), cert. denied, 502 U.S. 1066 (1992).[2]

2. On the merits, respondents mistakenly claim (Br. in Opp. 9-10) that the holding in *Gaudin* resolves the issue presented by the petition in this case. The issue before this Court in *Gaudin* was whether, when materiality is an element of a crime, it must be decided by the jury rather than the judge. The Court in *Gaudin* did not consider whether materiality is an element of 18 U.S.C. 1014, a statute that was not at issue in that case.[3]

Respondents also suggest (Br. in Opp. 10) that the petition should be denied because this Court has granted certiorari, vacated the judgment, and remanded several cases for reconsideration in light of *Gaudin*. Respondents note that one of those cases, *Waldron* v. *United States*, 116 S. Ct. 333 (1995), involved a prosecution under Section 1014. The Fifth

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[2] *Stirone* v. *United States*, 361 U.S. 212 (1960), on which respondents rely (Br. in Opp. 7), is inapposite. In *Stirone*, the trial court improperly added "a new basis for conviction" in its instructions that was different from the basis of the charge set out in the indictment. 361 U.S. at 217. The district court here did not commit that error when it removed the surplus description of respondents' false statements as material in its instructions to the jury. As for *United States* v. *Camp*, 541 F.2d 737 (8th Cir. 1976) (Br. in Opp. 7), it merely stated the fundamental principle that an indictment must allege all the essential elements of an offense.

[3] The statute at issue in *Gaudin* was 18 U.S.C. 1001. The government did not contest that materiality was an element of the clause of Section 1001 charged in that case, see 115 S. Ct. at 2313, and the Court did not address that issue in its decision. *Id.* at 2320-2321 (Rehnquist, C.J., concurring).

Circuit issued its decision in *Waldron* before *Gaudin* was decided, and it was therefore appropriate for this Court to remand the case to permit the court of appeals to address in the first instance any issues raised by the *Gaudin* decision. By contrast, the court of appeals' decision in this case expressly considered and resolved, in light of *Gaudin*, the question whether the materiality of the false statement is an independent element of Section 1014. The issue is therefore properly presented for determination in this Court.

* * * * *

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MARCH 1996

Supreme Court, U.S.
FILED
JUN
~~MAY~~ 13 1996
CLERK

No. 95-1228

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

JERRY E. WELLS AND KENNETH R. STEELE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

JAMES R. WYRSCH
Counsel of Record
W. BRIAN GADDY
Wyrsch Atwell Mirakian
Lee & Hobbs, P.C.
1101 Walnut Street
Suite 1300
Kansas City, MO 64106-2122
(816) 221-0080
Counsel of Record
for Respondents

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel of Record
for Petitioner

PETITION FOR A WRIT OF CERTIORARI FILED: JANUARY 31, 1996
CERTIORARI GRANTED: APRIL 22, 1996

TABLE OF CONTENTS

	Page
Relevant docket entries in the district court	1
Relevant docket entries in the court of appeals	5
Indictment	18
Partial Transcript of Proceedings, July 21, 1993	35
Excerpts from the Government's opening brief in the court of appeals, served April 12, 1994	49
Government's supplemental letter brief in the court of appeals, dated July 3, 1995	61
Respondents' supplemental letter brief in the court of appeals, dated July 5, 1995	70

UNITED STATES DISTRICT
FOR THE WESTERN DISTRICT OF MISSOURI

DOCKET NO. 93-CR-5006-ALL

UNITED STATES OF AMERICA, PLAINTIFF

v.

JERRY E. WELLS, ET AL., DEFENDANTS

DOCKET ENTRIES

1993

Feb. 11	(1)	INDICTMENT assigned to Judge Russell G. Clark Counts filed against Jerry E Wells (1) count(s) 1, 2, 3, 4, 5, Kenneth R. Steele (2) count(s) 1, 2, 3, 4, 5 (cd) [Entry date 02/11/93]
July 21	(131)	MOTION for judgment of acquittal at the close of all the evidence by defendant Jerry E Wells (nc) [Entry date 07/21/93]
July 21	(131)	ORDER by Judge Russell G. Clark granting motion for judgment of acquittal at the close of all the evidence as to Counts III and IV and denying motion for judgment of acquittal as to Counts I and II by defendant Jerry E Wells [131-1]

(DENIED ON FACE OF DOCUMENT) (nc) [Entry date 07/21/93]

July 21 (132) MOTION for judgment of acquittal at the close of all of the evidence by defendant Kenneth R Steele (nc) [Entry date 07/21/93]

July 21 (132) ORDER by Judge Russell G. Clark granting motion for judgment of acquittal at the close of all the evidence as to Counts III and IV and denied as to Counts I and II by defendant Kenneth R Steele [132-1] (DENIED ON FACE OF DOCUMENT) (nc) [Entry date 07/21/93]

July 21 (138) JURY INSTRUCTIONS - (Refused) (nc) [Entry date 07/21/93]

July 21 (140) MINUTE ENTRY: of 8th Day of Jury Trial All parties and the jury appear Defendant Steele continues presentation of testimony of Kenneth Steele Defendants Wells and Steele rest Court instructs the jury Respective counsel present closing arguments Jury retires to deliberate, returning with Guilty Verdicts, Counts 1 & 2, both defendants Court orders presentence investigation and report Defendants are continued on bond Court gives defendants until Friday, August 13,

1993 to file post trial motions (nc) [Entry date 07/26/93]

July 21 (142) VERDICT - We, the jury, find the defendant, Jerry E Wells, Guilty of the crime of conspiracy to make false statements as charged in Count One. We, the jury, find the defendant, Jerry E Wells, Guilty of the crime of making false statements to O'Bannon Bank in connection with the personal guaranties as charged in Count Two. (nc) [Entry date 07/26/93]

July 21 (143) VERDICT - We, the jury, find the defendant, Kenneth R Steele, Guilty of the crime of conspiracy to make false statements as charged in Count One. We, the jury, find the defendant Kenneth R Steele, Guilty of the crime of making false statements to O'Bannon Bank in connection with the personal guaranties as charged in Count Two. (nc) [Entry date 07/26/93]

Nov. 22 (186) JUDGMENT and Commitment issued to U.S. Marshal sentencing as to Jerry E Wells (1) count(s) 1, 2. Dft placed on probation for a term of 2 years on Count 1 and 2 years on Count 2 concurrent with Count 1. Dft shall 100 hrs of community service within the probationary No

fine. $100 MPA Party Jerry E Wells; Judge Russell Clark (jm) [Entry date 11/22/93]

Nov. 22 (187) JUDGMENT and Commitment issued to U.S. Marshal sentencing as to Kenneth R Steele (2) count(s) 1, 2. Dft placed on probation for a term of 2 years on Count 1 and 2 years on Count 2 concurrent with Count 1. Dft shall perform 100 hrs of community service within the probationary period. No fine. $100 MPA. Party Kenneth R Steele; Judge Russell Clark (jm) [Entry date 11/22/93]

Nov. 29 (191) NOTICE OF APPEAL by defendant Kenneth R Steel from Dist. Court decision [187-3] Filed 11/22/93 Entered 11/22/93 Paid $105 Rct. # 69120 (Transcripts have been prepared) (cd) [Entry date 12/02/93]

Nov. 29 (194) NOTICE OF APPEAL by defendant Jerry E Wells from Dist. Court decision [186-2] Filed 11/22/93 Entered 11/22/93 Paid $105 Rct. # 69145 (trans already prepared) (cd) [Entry date 12/03/93]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DOCKET NO. 93-3924

UNITED STATES OF AMERICA

v.

JERRY E. WELLS

DOCKET ENTRIES

12/7/93 Criminal Case Docketed (dkm) [93-3924]

12/7/93 REMARKS: 18:371 Lending, credit institutions; appealing conviction and sentence; defendant placed on 2 years probation; 100 hours community service; fine waived; $100 Special Assessment; 8 day trial [93-3924] (dkm) [93-3924]

2/22/94 BRIEF FILED - Brief of Appellants - Jerry E. Wells in 93-3924, Kenneth R. Steele in 93-3932. 60 pgs - w/ addendum 10 copies - w/ service 2/22/94. [93-3924, 93-3932, 94-1031] [404051] (sjo) [93-3924 93-3932 94-1031]

4/13/94 BRIEF FILED - Brief of Aplee/cr. Aplnt - Appellee USA in 93-3924, Appellee USA in 93-3932, Appellant USA in 94-1031, Appellant USA in 94-1031. 60 pgs - w/ addendum

- 11 copies w/ service 4/12/94. [93-3924, 93-3932, 94-1031] [423555] (sjo) [93-3924 93-3932 94-1031]

5/10/94 BRIEF FILED - Reply Brief of Aplnt/cr. Aplee - Jerry E. Wells in 93-3924, Kenneth R. Steele in 93-3932. 34 pgs - addendum - 10 copies - w/ service 5/9/94. [93-3924, 93-3932, 94-1031] TO COURT. [432522] (sjo) [93-3924 93-3932 94-1031]

5/24/94 BRIEF FILED - Reply Brief of Aplee/cr. Aplnt - USA in 93-3924, USA in 93-3932, USA in 94-1031. 11 pgs - 15 copies w/ service 5/23/94. [93-3924, 93-3932, 94-1031] TO COURT. [438556] (sjo) [93-3924 93-3932 94-1031]

6/13/94 ARGUED AND SUBMITTED IN ST. LOUIS, MO TO JUDGES Morris S. Arnold, Circuit Judge, John R. Gibson, Senior Judge, Michael J. Melloy, Visiting Judge (Chief Dist. Ct. Judge, Northern Iowa). James R. Wyrsch for Appellant Jerry E. Wells in 93-3924, James R. Wyrsch for Appellant Kenneth R. Steele, Appellant Kenneth R. Steele in 93-3932, James R. Wyrsch for Appellee Jerry E. Wells in 94-1031. Mark C. Thompson for Appellee USA in 93-3924/3932/94-1031. Rebuttal by: James R. Wyrsch. RECORDED. [93-3924, 93-3932, 94-1031] (mjh) [93-3924 93-3932 94-1031]

6/22/95 JUDGE ORDER: The parties are directed to file five copies of letter briefs not to exceed five pages on or before July 5, 1995, commenting upon the effect of United States v. Michael E. Gaudin, No. 94-514, 1995 WL 360212 (U.S. June 19, 1995), on these appeals. [93-3924, 93-3932, 94-1031] [586130] Supplemental briefs due on 7/5/95 in 93-3924, in 93-3932, in 94-1031 (lcd) [93-3924 93-3932 94-1031]

7/5/95 BRIEF FILED - Supplemental letter brief of appellee, USA in 93-3924, 93-3932, 94-1031 per court's request and order of 6/22/95 w/ service 7/3/95 [93-3924, 93-3932, 94-1031] TO COURT [590867] (lcd) [93-3924 93-3932 94-1031]

7/5/95 BRIEF FILED - Supplemental appellant letter brief with attached addendum filed per court's request and order of June 22, 1995, by Jerry E. Wells in 93-3924 and 94-1031, Kenneth R. Steele in 93-3932 w/ service 7/5/95. [93-3924, 93-3932, 94-1031] [590878], TO COURT. (lcd) [93-3924 93-3932 94-1031]

7/11/95 28(j) citation supplementing appellant's letter brief on pages 3 & 4, received and filed from Appellant Jerry E. Wells in 93-3924, Appellant Kenneth R. Steele in 93-3932, Appellee Kenneth R. Steele in 94-1031, Appellee Jerry E. Wells in 94-1031 TO COURT. [93-3924, 93-3932, 94-1031] [593295] (lcd) [93-3924 93-3932 94-1031]

8/21/95 THE COURT: Morris S. Arnold, John R. Gibson, Michael J. Melloy. OPINION FILED by Michael J. Melloy PUBLISHED . [93-3924, 93-3932, 94-1031] [607786] (mls) [93-3924 93-3932 94-1031]

8/21/95 JUDGMENT: Morris S. Arnold, John R. Gibson, Michael J. Melloy: The judgment of the district court is VACATED and the case REMANDED to the District Court in accordance with the opinion. [93-3924] [607787] (mls) [93-3924]

10/2/95 JUDGE ORDER: granting appellee motion extend petition for rehearing time with suggestion for rehearing en banc. [613631-1] [93-3924, 93-3932, 94-1031] in 93-3924, 93-3932, 94-1031 Petition for Rehearing due on 10/5/95 in 93-3924, in 93-3932, in 94-1031 (lcd) [93-3924 93-3932 94-1031]

10/5/95 PETITION for REHEARING with suggestions for rehearing en banc. Filed by Appellee USA in 93-3924, 93-3932, and 94-1031. , w/ service 10/4/95., TO COURT. [93-3924, 93-3932, 94-1031] (lcd) [93-3924 93-3932 94-1031]

11/2/95 JUDGE ORDER: denying petition for Rehearing for suggestion for rehearing en banc [625722-1] filed by USA, USA, USA, USA. Petition for panel Rehearing is also denied. [93-3924, 93-3932, 94-1031] [635646]

in 93-3924, 93-3932, 94-1031 (lcd) [93-3924 93-3932 94-1031]

2/7/96 U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 2/1/96. Supreme Ct. Case No.: 95-1228 [93-3924, 93-3932, 94-1031] [671647] (lcd) (93-3924 93-3932 94-1031]

5/2/96 U.S. Supreme Court order granting Supreme Court notice for certiorari [671647-1] in 93-3924, 93-3932, 94-1031. Order filed in the Supreme Court on 4/22/96 Sup. Ct. No. 95-1228 [93-3924, 93-3932, 94-1031] (lcd) [93-3924 93-3932 94-1031]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Docket No. 93-3932

UNITED STATES OF AMERICA

v.

KENNETH R. STEELE

DOCKET ENTRIES

12/7/93 Criminal Case Docketed (dkm) [93-3932]

12/7/93 REMARKS: 18:371 Lending, credit institutions; appealing conviction and sentence; 2 years probation; 100 hours community service; No fine; Special Assessment $100; 8 day trial. [93-3932] (dkm) [93-3932]

2/22/94 BRIEF FILED - Brief of Appellants - Jerry E. Wells in 93-3924, Kenneth R. Steele in 93-3932. 60 pgs - w/ addendum 10 copies - w/ service 2/22/94. [93-3924, 93-3932, 94-1031] [404051] (sjo) [93-3924 93-3932 94-1031]

4/13/94 BRIEF FILED - Brief for Aplee/cr. Aplnt - Appellee USA in 93-3924, Appellee USA in 93-3932, Appellant USA in 94-1031, Appellant USA in 94-1031. 60 pgs - w/ addendum - 11 copies w/ service 4/12/94. [93-3924, 93-3932, 94-1031] [423555] (sjo) [93-3924 93-3932 94-1031]

5/10/94 BRIEF FILED - Reply Brief of Aplnt/cr. Aplee - Jerry E. Wells in 93-3924, Kenneth R. Steele in 93-3932. 34 pgs - w/ addendum - 10 copies - w/ service 5/9/94. [93-3924, 93-3932, 94-1031] TO COURT. [432522] (sjo) [93-3924 93-3932 94-1031]

5/24/94 BRIEF FILED - Reply Brief of Aplee/cr. Aplnt - USA in 93-3924, USA in 93-3932, USA in 94-1031. 11 pgs - 15 copies w/ service 5/23/94. [93-3924, 93-3932, 94-1031] TO COURT. [438556] (sjo) [93-3924 93-3932 94-1031]

6/13/94 ARGUED AND SUBMITTED IN ST. LOUIS, MO TO JUDGES Morris S. Arnold, Circuit Judge, John R. Gibson, Senior Judge, Michael J. Melloy, Visiting Judge (Chief Dist. Ct. Judge, Northern Iowa). James R. Wyrsch for Appellant Jerry E. Wells in 93-3924, James R. Wyrsch for Appellant Kenneth R. Steele, Appellant Kenneth R. Steele in 93-3932, James R. Wyrsch for Appellee Jerry E. Wells in 94-1031. Mark C. Thompson for Appellee USA in 93-3924/3932/94-1031. Rebuttal by: James R. Wyrsch. RECORDED. [93-3924, 93-3932, 94-1031] (mjh) [93-3924 93-3932 94-1031]

6/22/95 JUDGE ORDER: The parties are directed to file five copies of letter briefs not to

exceed five pages on or before July 5, 1995, commenting upon the effect of United States v. Michael E. Gaudin, No. 94-514, 1995 WL 360212 (U.S. June 19, 1995), on these appeals. [93-3924, 93-3932, 94-1031] [586130] Supplemental briefs due on 7/5/95 in 93-3924, in 93-3932, in 94-1031 (lcd) [93-3924 93-3932 94-1031]

7/5/95 BRIEF FILED - Supplemental letter brief of appellee, USA in 93-3924, 93-3932, 94-1031 per court's request and order of 6/22/95 w/ service 7/3/95 [93-3924, 93-3932, 94-1031] TO COURT [590867] (lcd) [93-3924 93-3932 94-1031]

7/5/95 BRIEF FILED - Supplemental appellant letter brief with attached addendum filed per court's request and order of June 22, 1995, by Jerry E. Wells in 93-3924 and 94-1031, Kenneth R. Steele in 93-3932 w/ service 7/5/95. [93-3924, 93-3932, 94-1031] [590878], TO COURT. (lcd) [93-3924 93-3932 94-1031]

8/21/95 JUDGMENT: Morris S. Arnold, John R. Gibson, Michael J. Melloy: The judgment of the district court is VACATED and the case REMANDED to the District Court in accordance with the opinion. [93-3932] [607793] (mls) [93-3932]

10/2/95 JUDGE ORDER: granting appellee motion extend petition for rehearing time with suggestion for rehearing en banc.

[613631-1] [93-3924, 93-3932, 94-1031] in 93-3924, 93-3932, 94-1031 Petition for Rehearing due on 10/5/95 in 93-3924, in 93-3932, in 94-1031 (lcd) [93-3924 93-3932 94-1031]

10/5/95 PETITION FOR REHEARING with suggestions for rehearing en banc. Filed by Appellee USA in 93-3924, 93-3932, and 94-1031. w/ service 10/4/95. TO COURT. [93-3924, 93-3932, 94-1031] (lcd) [93-3924 93-3932 94-1031]

11/2/95 JUDGE ORDER: denying petition for Rehearing with suggestion for rehearing en banc [625722-1] filed by USA, USA, USA, USA. Petition for panel Rehearing is also denied. [93-3924, 93-3932, 94-1031] [635646] in 93-3924, 93-3932, 94-1031 (lcd) [93-3924 93-3932 94-1031]

2/7/96 U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 2/1/96. Supreme Ct. Case No.: 95-1228 [93-3924, 93-3932, 94-1031] [671647] (lcd) [93-3924 93-3932 94-1031]

5/2/96 U.S. Supreme Court order granting Supreme Court notice for certiorari [671647-1] in 93-3924, 93-3932, 94-1031. Order filed in the Supreme Court on 4/22/96 Sup. Ct. No. 95-1228 [93-3924, 93-3932, 94-1031] (lcd) [93-3924 93-3932 94-1031]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Docket No. 94-1031

UNITED STATES OF AMERICA

v.

JERRY WELLS, ET AL.

DOCKET ENTRIES

1/5/94 Criminal Case Docketed (dkm) [94-1031]

1/5/94 CERTIFIED copies of notice of cross-appeal, docket entries, 11/22/93 judgment. [385174] (dkm) [94-1031]

8/21/95 JUDGMENT: Morris S. Arnold, John R. Gibson, Michael J. Melloy: The judgment of the district court is VACATED and the case REMANDED to the District Court in accordance with the opinion. [94-1031] [607789] (mls) [94-1031]

8/31/95 MOTION of aplee, USA in 93-3924, 93-3932, 94-1031 for extension of time to file petition for rehearing enbanc until 10/5/95. [93-3924, 93-3932, 94-1031] [613631], TO COURT. w/ service 8/29/95 (lcd) [93-3924 93-3932 94-1031]

9/5/95 MOTION of aplnt, Jerry E. Wells in 93-3924, Jerry E. Wells in 94-1031 , for extension of time to file petition for rehearing by the panel until 10/5/95. [93-3924, 94-1031] [624165] w/ service 9/1/95 (lcd) [93-3924 94-1031]

10/2/95 JUDGE ORDER: granting appellee motion extend petition for rehearing time with suggestion for rehearing en banc. [631631-1] [93-3924, 93-3932, 94-1031] in 93-3924, 93-3932, 94-1031 Petition for Rehearing due on 10/5/95 in 93-3924, in 93-3932, in 94-1031 (lcd) [93-3924 93-3932 94-1031]

10/2/95 JUDGE ORDER: granting appellant motion extend petition for rehearing time [624165-1] [93-3924, 94-1031] in 93-3924, 94-1031 Petition for Rehearing due on 10/5/95 in 93-3924, in 94-1031 (lcd) [93-3924 94-1031]

10/5/95 PETITION FOR REHEARING with suggestions for rehearing en banc. Filed by Appellee USA in 93-3924, 93-3932, and 94-1031. w/ service 10/4/95. TO COURT. [93-3924, 93-3932, 94-1031] (lcd) [93-3924 93-3932 94-1031]

11/2/95 JUDGE ORDER: denying petition for Rehearing with suggestion for rehearing en banc [625722-1] filed by USA, USA, USA, USA. Petition for panel Rehearing is also denied. [93-3924, 93-3932, 94-1031] [635646] in 93-3924, 93-3932, 94-1031 (lcd) [93-3924 93-3932 94-1031]

11/20/95 MANDATE ISSUED [94-1031] (rmh) [94-1031]

2/7/96 U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 2/1/96. Supreme Ct. Case No.: 95-1228 [93-3924, 93-3932, 94-1031] [671647] (lcd) [93-3924 93-3932 94-1031]

5/2/96 U.S. Supreme Court order granting Supreme Court notice for certiorari [671647-1] in 93-3924, 93-3932, 94-1031. Order filed in the Supreme Court on 4/22/96 Sup. Ct. No. 95-1228 [93-3924, 93-3932, 94-1031] (lcd) [93-3924 93-3932 94-1031]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHWEST DIVISION

No. 93-05006-01/02-CR-SW-4

UNITED STATES OF AMERICA, PLAINTIFF

v.

JERRY E. WELLS, [DOB: 09-09-34]
and
KENNETH R. STEELE, [DOB: 02-19-34], DEFENDANTS

COUNT ONE: BOTH DEFENDANTS
18 U.S.C. 371
NMT: 5 YEARS AND $250,000
CLASS D FELONY
SUPERVISED RELEASE: NMT 3 YEARS
ORDER OF RESTITUTION

COUNTS TWO, THREE AND FOUR: BOTH DEFENDANTS
18 U.S.C. 1014 AND 2
NMT: 2 YEARS AND $250,000
CLASS E FELONY
SUPERVISED RELEASE: NMT 1 YEAR
ORDER OF RESTITUTION

COUNT FIVE: BOTH DEFENDANTS
18 U.S.C. 1014 AND 2
NMT: 20 YEARS AND $250,000
CLASS C FELONY
SUPERVISED RELEASE: NMT 3 YEARS
ORDER OF RESTITUTION

$50 SPECIAL ASSESSMENT
EACH DEFENDANT, EACH COUNT OF CONVICTION

[Filed: Feb. 11, 1993]

INDICTMENT

THE GRAND JURY CHARGES THAT:

INTRODUCTION:

At all times material to this Indictment:

1. Doss Office Systems, Inc. ("DOS"), was purchased by defendants JERRY E. WELLS and KENNETH R. STEELE on or about May 21, 1986, from Henry E. Doss of Joplin, Missouri.

2. DOS was operated by defendants JERRY E. WELLS and KENNETH R. STEELE under that name until in or about December 1988, when it was incorporated under the laws the state of Delaware and renamed "Copytech Systems, Inc." ("Copytech"). Copytech was a subsidiary of W & S Holding Company, Inc. which was wholly-owned by defendants JERRY E. WELLS and KENNETH R. STEELE and by James W. Russell.

3. Copytech was in the business of selling, leasing and servicing copier systems and business machine equipment in a four-state area consisting of Missouri, Kansas, Arkansas, and Oklahoma. Copytech's corporate headquarters were located in Joplin, in the Western District of Missouri, and it operated branch

locations in the other states employing a total of approximately 200 people.

4. Copytech's officers and their respective duties during the relevant period were as follows:

a. As Chairman and Secretary of Copytech, defendant JERRY E. WELLS handled and was involved in the financial aspects of Copytech and performed legal services for Copytech which included reviewing and approving the wording of Copytech's sales, lease and servicing contracts;

b. As President of Copytech, defendant KENNETH R. STEELE worked in Copytech's headquarters on a daily basis where he was involved in the administrative functions and operations of the corporate office and signed company checks and other documents;

c. As Vice President of Sales and Chief Executive Officer of Copytech, James W. Russell concentrated on generating sales and monitoring the sales force and was also involved in day-to-day operations and the administration of Copytech.

5. Beginning in 1986, under the management of defendants JERRY E. WELLS and KENNETH R. STEELE Copytech's copier business relied heavily on a marketing scheme the company called "Copier Management Program" ("CMP"). Under the CMP, Copytech's customers contracted to purchase a minimum number of copies per month at a fixed rate per copy. The fixed rate included the leased copier equipment, maintenance services, and supplies. The usual term of the lease contract was sixty months (5 years).

6. Customers entered into equipment leases with Copytech by signing written contracts which included formal lease agreements and schedules of

equipment and services provided under the terms of the Copier Management Program. The CMP schedules provided for ongoing maintenance services at no additional charge.

7. After a contract was made with a customer, the contract documents were sent to Copytech's headquarters in Joplin, Missouri, for further processing. Contract files were maintained in the Joplin office under the direction and control of defendants, JERRY E. WELLS and KENNETH R. STEELE and others.

8. Equity Rental Company, Inc. ("ERC") was a subsidiary of Copytech. Defendants JERRY E. WELLS and KENNETH R. STEELE established ERC to arrange and manage financing for company sales and leases of copier equipment. In that capacity, ERC acted as lessor in many of the lease contracts with Copytech's customers.

9. Defendants JERRY E. WELLS and KENNETH R. STEELE financed Copytech's operating requirements by selling, at a discounted price, Copytech's and ERC's lease contracts to banks and other financial institutions. The purchase of the contracts transferred the rights and obligations arising under each contract to the respective purchaser, often a bank. After contracts were sold, many times Copytech would continue to be the point of contact with the customer rather than the purchaser of the contract in order for Copytech to maintain its relationship with the customer.

10. In order for Copytech to secure funding from the sale of a lease contract, the banks required that Copytech do the following:

a. provide financial statements of Copytech and ERC;

b. provide copies of the lease contracts and all material information relating to the contract to be purchased in order for the bank to review the information and approve the purchase;

c. provide written agreements whereby Copytech would agree upon request by the bank to repurchase the lease contract from the bank;

d. assign to one or more of the purchasers the lease payments from the contracts;

e. if a contract was modified or amended after the sale of the contract, notify the appropriate bank of that information;

f. if a contract was renegotiated, upgraded, or cancelled after purchase by the bank, repay the outstanding contract balance to the bank; and

g. pledge the copier equipment as collateral or security for the bank in the event the customer would fail to pay the bank or fail to pay Copytech.

11. Defendants JERRY E. WELLS and KENNETH R. STEELE and their respective spouses were at times also required to sign personal guaranties in order for Copytech to sell lease contracts to certain banks. The personal guaranty was a promise by the individual to pay the bank personally if the lessee failed to perform its obligations under the terms of the contract and it also allowed the bank to pursue the assets of that guarantor in the event that the lessor defaulted on an agreement with a bank. Generally, the bank also reviewed the lessee's financial statement which was provided by Copytech.

12. From the time Copytech was purchased by defendants JERRY E. WELLS and KENNETH R. STEELE Copytech experienced financial difficulties and the Copytech operating account at First State

Bank of Joplin ("First State Bank") was regularly overdrawn. In the fall of 1989, the financial difficulties of Copytech increased and its cash flow problems became more severe. Defendants JERRY E. WELLS and KENNETH R. STEELE were each continually informed of the financial status of Copytech. Copytech ultimately ceased operations on or about May 14, 1990, citing inadequate financial resources to continue operations.

13. One funding source for Copytech was Boatmen's First National Bank of Kansas City (Boatmen's Bank-K.C.). In or about May, 1986, defendants JERRY E. WELLS and KENNETH R. STEELE contacted and caused to be contacted Boatmen's Bank-K.C. regarding the proposed sale of lease contracts. During their discussions with Boatmen's Bank-K.C., defendants JERRY E. WELLS and KENNETH R. STEELE and James W. Russell made full disclosure of the material terms and conditions of Copytech's lease contracts; that is, Boatmen's Bank-K.C. was informed that the contracts included equipment leases, copier supplies and machine servicing. Boatmen's Bank-K.C. thereafter determined that the supply/servicing aspect of the leases, that is the CMP, represented a substantial portion of the value of each lease contract. Because of the costs associated with the CMP program, Boatmen's Bank-K.C. informed the defendants, KENNETH R. STEELE and JERRY E. WELLS, that the bank would not allow Copytech the unrestricted use of the proceeds due to Copytech from the proposed sale of lease contracts.

14. Prior to purchasing any lease contracts, Boatmen's Bank-K.C. required that Copytech maintain reserve bank accounts at Boatmen's Bank-K.C.

The purpose of the reserve accounts was to reserve a portion of the proceeds obtained from Boatmen's Bank-K.C. by Copytech from the sale of the lease contracts: (a) to serve as collateral or security against any failure to pay by the lessees or customers; and (b) to serve as a source of funds for the servicing of the leased equipment pursuant to the CMP provision if Copytech failed or could not service the equipment as required during the term of the lease.

15. Ultimately, lease contracts that were purchased by Boatmen's Bank-K.C. were sold to other funding sources but the monies in the reserve accounts were released to Copytech and ERC.

16. The banks which are the subject of this Indictment are known as O'Bannon Banking Company ("O'Bannon Bank"), Buffalo, Missouri, Boatmen's National Bank of Springfield ("Boatmen's Bank-Springfield"), Springfield, Missouri; and Bank IV of Wichita, N.A. ("Bank IV"), Wichita, Kansas.

17. At all times material herein the deposits of O'Bannon Bank, Boatmen's Bank-Springfield and Bank IV were insured by the Federal Deposit Insurance Corporation ("FDIC"). The FDIC is an agency of the United States of America established to protect depositors by insuring deposits in member banks in amounts up to $100,000 per account.

18. Other financing for Copytech's operations was obtained from certain other banks located both inside and outside the State of Missouri, including Empire Bank, Springfield, Missouri; First National Bank of Dolton, Illinois; Western National Bank, Tulsa, Oklahoma; and Bank of Oklahoma, Tulsa, Oklahoma. The deposits of each of these banks were insured by the FDIC.

COUNT ONE

THE CONSPIRACY AND ITS OBJECTS

19. Beginning in or about late 1986, and continuing until on or about May 14, 1990, in the Western District of Missouri, and elsewhere, the defendants JERRY E. WELLS and KENNETH R. STEELE knowingly and intentionally conspired, combined, confederated and agreed with each other and with others known and unknown to the Grand Jury, to defraud the United States and to commit certain offenses against the United States, namely, to knowingly make and cause to be made false statements for the purpose of influencing O'Bannon Bank, Boatmen's Bank-Springfield and Bank IV, financial institutions whose accounts were insured by the FDIC, in violation of Title 18, United States Code, Section 1014 and 2.

MANNER AND MEANS

20. It was a part of the conspiracy and in furtherance of it that defendants JERRY E. WELLS and KENNETH R. STEELE agreed to finance Copytech's operations and other matters through O'Bannon Bank, Boatmen's Bank-Springfield, and Bank IV and through other outside sources. Defendants JERRY E. WELLS and KENNETH R. STEELE made and caused to be made false statements and representations and withheld information of material fact for the purpose of influencing the actions of O'Bannon Bank, Boatmen's Bank-Springfield, and Bank IV.

21. As part of and in furtherance of the conspiracy, defendants JERRY E. WELLS and KENNETH R.

STEELE, in or about late 1986 or early 1987, as a result of a meeting with representatives of Norwest Bank concerning the purchase of lease contracts, held a meeting wherein defendants JERRY E. WELLS and KENNETH R. STEELE and James W. Russell, agreed that they would withhold and conceal the fact that CMP was part of the lease contracts that banks were purchasing.

22. As part of and in furtherance of the conspiracy, defendants JERRY E. WELLS and KENNETH R. STEELE and James W. Russell and others unknown to the Grand Jury would negotiate and cause to be negotiated the sale of lease contracts. During such negotiations, defendants JERRY E. WELLS and KENNETH R. STEELE knowingly withheld and caused to be withheld from O'Bannon Bank and Bank IV, material information concerning the lease contracts, namely, that the CMP was part of the contractual obligation of lease contracts that the banks would be purchasing.

23. As part of and in furtherance of the conspiracy, defendants JERRY E. WELLS and KENNETH R. STEELE forged and caused to be forged documents submitted to O'Bannon Bank for the purpose of influencing the bank, that is, the signatures of the defendants' spouses on the unconditional personal guaranties were forged by defendants JERRY E. WELLS and KENNETH R. STEELE and submitted to O'Bannon Bank.

24. As part of and in furtherance of the conspiracy, defendants JERRY E. WELLS and KENNETH R. STEELE withheld material information from the banks by "double pledging" collateral (the leased equipment) and "double funding" contracts without the knowledge, approval, and authorization of

O'Bannon Bank in that they sold, caused to be sold and attempted to sell contracts previously purchased by O'Bannon Bank to other purchasers without informing O'Bannon Bank, thereby causing O'Bannon Bank to delay the exercise of its option to demand repurchase of the lease contracts purchased from Copytech and ERC.

25. As part of and in furtherance of the conspiracy, defendants JERRY E. WELLS and KENNETH R. STEELE would be notified that a lease contract which had already been purchased by Boatmen's Bank-Springfield was, in reality, a "dead deal", that is, a transaction in which a lease contract between the customer and Copytech or ERC was either cancelled, invalid, or had never been in existence. Despite knowledge of that fact, defendants JERRY E. WELLS and KENNETH R. STEELE would conspire to withhold and cause to be withheld from Boatmen's Bank-Springfield material information that the contract or agreement was either cancelled, invalid, or had never been in existence, for the purpose of influencing the actions of Boatmen's Bank-Springfield, thereby causing Boatmen's Bank-Springfield to delay the exercise of its option to demand repurchase of the lease contracts purchased from Copytech and ERC.

26. As part of and in furtherance of the conspiracy, defendants JERRY E. WELLS and KENNETH R. STEELE for the purpose of influencing the actions of the banks, would fail to provide to O'Bannon Bank and Bank IV complete lease contract files, when in truth and fact, defendants JERRY E. WELLS and KENNETH R. STEELE well knew the documentation submitted to those financial institutions was

incomplete and inaccurate and materially affected Copytech's and ERC's agreements with the banks.

27. On or about January 25, 1988, the accounting firm of Arthur Young & Co. prepared financial statements and issued an auditor's report for the benefit of and at the request of Copytech. A purpose for the preparation of the 1987 financial statements and the auditor's report was to assist Copytech in obtaining financing from the banks since financial statements were required by the banks. On or about April 6, 1989, defendant JERRY E. WELLS was informed that the "auditor's report issued by Arthur Young & Company dated January 25, 1988 must no longer be relied upon or be associated with the combined balance sheet of Doss Office Systems/Equity Rental Company, Inc. and the related statements of income and retained earnings and changes in financial position for the year ended . . ." Defendant JERRY E. WELLS was requested "to immediately notify the Bank of Oklahoma and all other recipients of such 1987 financial statements and related auditor's report, that they should not be relied upon . . ."

28. As part of and in furtherance of the conspiracy, despite the request by Arthur Young & Co., defendants JERRY E. WELLS and KENNETH R. STEELE failed to notify O'Bannon Bank, Boatmen's Bank-Springfield and Bank IV that the 1987 financial statements of Copytech and ERC and related auditor's report was incorrect and inaccurate and could no longer be relied on, for the purpose of influencing the actions of O'Bannon Bank, Boatmen's Bank-Springfield and Bank IV.

OVERT ACTS

29. In furtherance of the conspiracy, and in order to effect its objects, the following overt acts were committed in the Western District of Missouri and elsewhere:

a. On or about March 28, 1989, defendants JERRY E. WELLS and KENNETH R. STEELE and others caused to be submitted to O'Bannon Bank the unconditional personal guaranties of their spouses in order to influence the actions of O'Bannon Bank in connection with the purchase of lease contracts from Copytech and ERC when defendants JERRY E. WELLS and KENNETH R. STEELE knew, in truth and fact, that the guaranties of their spouses were forged by defendants JERRY E. WELLS and KENNETH R. STEELE and, therefore were unenforceable;

b. On or about June 3, 1989, defendants JERRY E. WELLS and KENNETH R. STEELE and others, without the prior authorization, approval and knowledge of O'Bannon Bank, sold and caused to be sold the John Zink Company lease contract which had previously been purchased by O'Bannon Bank on or about April 17, 1989, causing such contract to be "double funded", that is, the John Zink contract was sold to both O'Bannon Bank and to First National Bank of Dolton, Illinois. Defendants JERRY E. WELLS and KENNETH R. STEELE and others fraudulently failed to inform O'Bannon Bank of the sale, in order to influence the actions of the bank;

c. On or about July 7, 1989, defendants JERRY E. WELLS and KENNETH R. STEELE aiding and abetting each other and others known to the Grand Jury, knowingly made and caused to be made false

statements of material fact to Bank IV, for the purpose of influencing said bank, in that defendants JERRY E. WELLS and KENNETH R. STEELE caused the 1987 financial statements of Copytech and ERC and related auditor's report to be prepared and issued by Arthur Young & Co., in the Western District of Missouri, and thereafter submitted the 1987 financial statements of Copytech and ERC and related auditor's report and caused them to be submitted to Bank IV, in order to influence the actions of Bank IV, when in truth and fact, as defendants JERRY E. WELLS and KENNETH R. STEELE well knew, the 1987 financial statements of Copytech and ERC and related auditor's report were incorrect and inaccurate and could not be relied upon.

d. On or about July 7, 1989, defendants JERRY E. WELLS and KENNETH R. STEELE aiding and abetting each other and others known to the Grand Jury, knowingly made and caused to be made false statements of material fact to Bank IV, for the purpose of influencing said bank, in that defendants JERRY E. WELLS and KENNETH R. STEELE caused to be provided to Bank IV approximately 17 lease contracts which falsely stated that maintenance was the responsibility of the lessee. Defendants JERRY E. WELLS and KENNETH R. STEELE failed to provide material portions of the lease contracts to Bank IV, that is, the relevant CMP schedules, in order to influence the actions of Bank IV, when in truth and fact, as defendants JERRY E. WELLS and KENNETH R. STEELE well knew, maintenance on the copier equipment performed pursuant to the CMP schedule was a material part of the contracts that Bank IV purchased.

e. On or about September 20, 1989, defendant KENNETH R. STEELE received notice by memorandum prepared by an employee of Copytech that Copytech had too many "deals go dead". Despite knowledge of that fact, defendants JERRY E. WELLS and KENNETH R. STEELE withheld and caused to be withheld from Boatmen's Bank-Springfield that lease contracts purchased by Boatmen's Bank-Springfield from Copytech and ERC were cancelled, invalid, and not in existence, for the purpose of influencing the actions of Boatmen's Bank-Springfield.

30. The Grand Jury incorporates by reference the allegations in Counts Two, Three, Four and Five of this Indictment as overt acts in furtherance of the conspiracy.

31. As a result of defendants KENNETH R. STEELE's and JERRY E. WELLS' conspiracy to make false statements, O'Bannon Bank suffered losses of approximately $620,000; Boatmen's Bank-Springfield suffered losses of approximately $2,414,800; and Bank IV suffered losses of approximately $587,000.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

1. The Grand Jury hereby incorporates and realleges each and every allegation contained in paragraphs 1 through 18 of the Introduction of this Indictment.

2. On or about March 28, 1989, at Buffalo, in the Western District of Missouri and elsewhere, defendants JERRY E. WELLS and KENNETH R. STEELE knowingly made and caused to be made false

statements of material fact to O'Bannon Bank, an institution whose deposits were then insured by the FDIC, for the purpose of influencing said bank, in that defendants JERRY E. WELLS and KENNETH R. STEELE submitted and caused to be submitted to O'Bannon Bank unconditional personal guaranties bearing the signatures of Janice C. Steele and Kay Wells in order to influence the actions of O'Bannon Bank concerning the purchase of lease contracts from Copytech and ERC, and at the time the personal guaranties were submitted to O'Bannon Bank, defendants JERRY E. WELLS and KENNETH R. STEELE knew full well that they had forged the signatures of their spouses Janice C. Steele and Kay Wells on the unconditional personal guaranties.

All in violation of Title 18, United States Code, Sections 1014 and 2.

COUNT THREE

1. The Grand Jury hereby incorporated and realleges each and every allegation contained in paragraph 1 through 18 of the Introduction of this Indictment.

2. On or about July 7, 1989, at Joplin, in the Western District of Missouri and elsewhere, defendants JERRY E. WELLS and KENNETH R. STEELE aiding and abetting each other and others known to the Grand Jury, knowingly made and caused to be made false statements of material fact to and withheld information of material fact from Bank IV, an institution whose deposits were then insured by the FDIC, for the purpose of influencing said bank, in that defendants JERRY E. WELLS and KENNETH R. STEELE caused the 1987 financial statements of Copytech and ERC and related auditor's report to be

prepared and issued by Arthur Young & Co., in the Western District of Missouri, and thereafter submitted the 1987 financial statements of Copytech and ERC and related auditor's report and caused them to be submitted to Bank IV, in order to influence the actions of Bank IV, when in truth and fact, as defendants JERRY E. WELLS and KENNETH R. STEELE well knew, the 1987 financial statements of Copytech and ERC and related auditor's report was incorrect and inaccurate and could not be relied upon and defendants JERRY E. WELLS and KENNETH R. STEELE failed to advise Bank IV of this fact.

All in violation of Title 18, United States Code, Sections 1014 and 2.

COUNT FOUR

1. The Grand Jury hereby incorporates and realleges each and every allegation contained in paragraphs 1 through 18 of the Introduction of this Indictment.

2. On or about July 7, 1989, at Joplin, in the Western District of Missouri and elsewhere, defendants JERRY E. WELLS and KENNETH R. STEELE aiding and abetting each other and others known to the Grand Jury, knowingly made and caused to be made false statements of material fact to and withheld information of material fact from Bank IV, an institution whose deposits were then insured by the FDIC, for the purpose of influencing said bank, in that defendants JERRY E. WELLS and KENNETH R. STEELE caused to be provided to Bank IV approximately 17 lease contracts which falsely stated that maintenance was the responsibility of the lessee (customer). Despite knowledge of that fact, defendants JERRY E. WELLS and KENNETH R.

STEELE failed to provide material portions of the lease contracts to Bank IV, that is, the relevant CMP schedules, in order to influence the actions of Bank IV, when in truth and fact, as defendants JERRY E. WELLS and KENNETH R. STEELE well knew, maintenance on the copier equipment performed pursuant to the CMP schedule was a material part of the contracts that Bank IV purchased.

All in violation of Title 18, United States Code, Sections 1014 and 2.

COUNT FIVE

1. The Grand Jury hereby incorporates and realleges each and every allegation contained in paragraphs 1 through 18 of the Introduction of this Indictment.

2. On or about September 20, 1989, at Joplin, in the Western District of Missouri and elsewhere, defendants JERRY E. WELLS and KENNETH R. STEELE aiding and abetting each other and others known to the Grand Jury, knowingly made and caused to be made false statements of material fact to and withheld information of material fact from Boatmen's Bank-Springfield, an institution whose deposits were then insured by the FDIC, for the purpose of influencing said bank, in that defendant KENNETH R. STEELE received notice by memorandum prepared by an employee of Copytech that Copytech had too many "deals go dead". Thereafter, an employee prepared a list of "DEAD DEALS" for defendant JERRY E. WELLS which included the Strafford RVI School lease contract. Despite knowledge of that fact, defendants JERRY E. WELLS and KENNETH R. STEELE withheld and caused to be withheld from Boatmen's Bank-Springfield that the Strafford RVI

School lease contract purchased by Boatmen's Bank-Springfield from Copytech and ERC was cancelled, invalid, and not in existence, for the purpose of influencing the actions of Boatmen's Bank-Springfield, depriving Boatmen's Bank-Springfield its right to demand Copytech and ERC repurchase the Strafford RVI School lease contract.

All in violation of Title 18, United States Code, Sections 1014 and 2.

A TRUE BILL

/s/ JOYCE HUMBES
FOREPERSON OF THE GRAND JURY

/s/ MARK C. THOMPSON
MARK C. THOMPSON #38606
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

No. 93-05006-01/02-CR-SW-4

UNITED STATES OF AMERICA, PLAINTIFF

v.

JERRY E. WELLS AND KENNETH R. STEELE,
DEFENDANTS

Springfield, Mo.
Wednesday, July 21, 1993

VOLUME VIII
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RUSSELL G. CLARK,
UNITED STATES DISTRICT JUDGE, AND A JURY

* * *

[1744] THE COURT: All right. Following the conferences on instructions, the Court has indicated it will give instructions numbered 1 through 26. Instructions 1 through 7 were given at the commencement of the trial; they were tendered by the government, and there was no objection.

Instructions 24 and 25 have been submitted [1745] by Defendant Steele and Instruction 23 was submitted by Defendant Wells.

Instructions 21 and 23 were submitted by both defendants. All the balance of the instructions were submitted by the United States government.

Now, the defendants have offered instructions which the Court numbered A through E, inclusive, which are being refused by the Court; in addition, Instruction No. F, which is tendered by the government, is being refused.

THE COURT: Mr. Thompson, do you wish to make any record on behalf of the government concerning these instructions?

MR. THOMPSON: Your Honor, other than the instructions you have accepted, the United States has no objections.

THE COURT: Mr. Wyrsch.

MR. WYRSCH: Your Honor, we would object to Instructions 15, 18 and 20 on the basis they submitted to the jury a theory that the defendants could be found guilty on failing to disclose or for concealment of material facts. We do not believe that is a viable theory under Section 1014 or under Count 1, the conspiracy, and we respectfully object to those instructions in that regard.

We would object, of course, to the Court not [1746] giving A through E. That's enough said on that matter.

We would object to giving of any of the instructions based on insufficiency of evidence.

We would object—and, in accordance with our motion for judgment of acquittal at the close of all the evidence and the close of the government's case, we would object to the giving of instructions in that the government's proof in this case would show more than one conspiracy and otherwise constitutes a variance or constructive amendment of the indictment.

We would object with respect to the matter of materiality not being submitted to the jury, and we made a record on that which we would respectfully incorporate into our remarks, but ask permission of the Court, with respect to these objections, that they would be the same objections that we would make at the end of the Court's reading the instructions so you won't have to repeat them again, if that's satisfactory with the Court. I think the rule requires that we do that unless we ask permission from the Court to — —

THE COURT: Mr. Bradshaw.

MR. BRADSHAW: Your Honor, on behalf of Defendant Kenneth Steele, I join in and adopt Mr. Wyrsch's objections. We object to any of the instructions tendered by Defendant Steele which have been refused by the Court.

[1747] We believe that there has been a fatal variance between the indictment alleged in Count— the con-spiracy alleged in Count 1 of the indictment and the government's evidence; and we believe that the Court's effort to cure that situation by giving the conspiracy instructions still allows a fatal variance to exist so that the conspiracy being submitted to the jury for its consideration is not the conspiracy alleged in the indictment, and that specifically we object to all of those conspiracy instructions which we think are Instructions Nos. 13, and 15 through 19.

INSTRUCTION NO. 13

The charges in this case are as follows:

Under Count One, the indictment charges that defendants Jerry E. Wells and Kenneth R. Steele committed the crime of conspiracy to make false statements to financial institutions in violation of 18 U.S.C. §§ 371, 1014, and 2.

Under Count Two, the indictment charges that defendants Jerry E. Wells and Kenneth R. Steele committed the crime of knowingly making and causing to be made false statements of material facts to O'Bannon Bank by submitting to O'Bannon Bank the unconditional personal guaranties bearing the signatures of Janice C. Steele and Kay Wells in order to influence the actions of O'Bannon Bank concerning the purchase of lease contracts from Copytech and ERC, and at the time the personal guaranties were submitted to the O'Bannon Bank, the defendants knew full and well that they had forged the signatures of their spouses Janice C. Steele and Kay Wells on the unconditional personal guaranties in violation of 18 U.S.C. §§ 1014 and 2. Each defendant has pleaded not guilty to each crime with which he is charged.

As I told you at the beginning of trial, an indictment is simply an accusation. It is not evidence of anything. To the contrary, each defendant is presumed to be innocent. Thus each defendant, even though charged, begins the trial with no evidence against him. So the presumption of innocence alone is sufficient to find the defendant not guilty and can be overcome only if the government proves, beyond a

reasonable doubt, each essential element of the crime charged.

Keep in mind that you must give separate consideration to the evidence about each individual defendant. Each defendant is entitled to be treated separately, and you must return a separate verdict for each defendant. Also keep in mind that you must consider, separately, each crime charged against each individual defendant, and must return a separate verdict for each of those crimes charged.

INSTRUCTION NO. 15

The crime of conspiracy as charged in Count One of the indictment, has four essential elements, which are:

One, beginning in late 1986, two or more persons reached an agreement or came to an understanding to make false statements to financial institutions in order to influence their decisions in the purchase of lease contracts by making the causing to be made false statements and representations and withholding and concealing information of material fact for the purpose of influencing the actions of the financial institutions;

Two, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect;

Three, at the time the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding; and

Four, while the agreement or understanding was in effect, a person or persons who had joined in the

agreement knowingly did one or more of the following acts:

a. On or about March 28, 1989, defendants Jerry E. Wells and Kenneth R. Steele and others caused to be submitted to O'Bannon Bank the unconditional personal guaranties of their spouses in order to influence the actions of O'Bannon Bank in connection with the purchase of lease contracts from Copytech and ERC when defendants Jerry E. Wells and Kenneth R. Steele knew, in truth and fact, the signatures of their spouses were forged by defendants Jerry E. Wells and Kenneth R. Steele and, therefore were unenforceable.

b. In accordance with the conspiracy agreement made in 1986, beginning in or about February 1989, defendants Jerry E. Wells and Kenneth R. Steele made and caused to be made false statements of material fact to O'Bannon Bank, for the purpose of influencing the bank, in that defendants Jerry E. Wells and Kenneth R. Steele caused to be provided to O'Bannon Bank lease contracts which falsely stated that maintenance was the responsibility of the lessee. Defendants Jerry E. Wells and Kenneth R. Steele failed to provide material portions of the lease contracts to O'Bannon Bank, that is, the relevant CMP schedules in order to influence the actions of O'Bannon Bank, when in truth and fact as defendants Jerry E. Wells and Kenneth R. Steele well knew, maintenance on the copier equipment performed pursuant to the CMP schedules was a material part of the contracts O'Bannon Bank purchased.

c. In accordance with the conspiracy agreement made in 1986 James Russell knowingly made and caused to be made false statements of material fact to Bank IV, for the purpose of influencing the bank, in

that James Russell caused to be provided to Bank IV eighteen (18) lease contracts which falsely stated that maintenance was the responsibility of the lessee. James Russell failed to provide material portions of the lease contracts to Bank IV, that is, the relevant CMP schedules, in order to influence the actions of Bank IV, when in truth and fact, as James Russell and defendants Jerry E. Wells and Kenneth R. Steele well knew, maintenance on the copier equipment performed pursuant to the CMP schedule was a material part of the contracts that Bank IV purchased.

For you to find a defendant guilty of this crime the government must prove all of these elements beyond a reasonable doubt as to that defendant; otherwise you must find that defendant not guilty.

INSTRUCTION NO. 18

To assist you in determining whether there was an agreement or understanding to make false statements to banks, you are advised that the elements of making a false statement to a bank are:

One, that the bank was federally insured;

Two, that the defendant made or caused to be made a false statement to the bank knowing that it was false, or withheld information of material fact from the bank; and

Three, that the defendant did so for the purpose of convincing the bank to purchase lease contracts.

Count One of the indictment charges the defendants Jerry E. Wells and Kenneth R. Steele and others who are not presently defendants in this case with the charge of conspiracy to make false statements to O'Bannon Bank and Bank IV. In these

instructions I define the elements of making a false statement to a bank in relation to the charges that the defendants made false statements to a bank. You may use these definitions in considering whether the defendants conspired to make false statements to the banks, keeping in mind that the charges in Count One charge a conspiracy to make false statements and not that the crime of making a false statement was committed.

INSTRUCTION NO. 20

The crime of making a false statement to a bank as charged in Count Two of the Indictment has three essential elements which are:

First: That O'Bannon Bank was federally insured;

Second: That the defendant knowingly made or caused to be made a false statement to the bank, that is, by submitting the forged unconditional personal guaranties of their spouses;

Third: That the defendants did so for the purpose of convincing the bank to purchase lease contracts.

It is not necessary, however, to prove that the institution involved was, in fact, influenced or misled. What must be proven is that the defendant intended to influence the bank by the false statement.

A statement or representation is "false" when it is untrue when made or effectively conceals a material fact. A material fact is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction.

An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake or accident. The government is not required to prove that the defendant knew that his acts or omissions

were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

The materiality of the statement or representation alleged to be false or concealed is not a matter with which you are concerned and should not be considered by you in determining the guilt or innocence of the defendant.

To make a false statement to a federally insured bank, the defendant need not directly submit the false statement to the institution. It is sufficient if the defendant submits the statement to a third party knowing that the third party will submit the false statement to the federally insured bank.

For you to find a defendant guilty of the crime charged under Count Two, the government must prove all of the essential elements beyond a reasonable doubt as to that defendant; otherwise you must find that particular defendant not guilty of this crime under Count Two.

INSTRUCTION NO. 21

One of the issues in this case is whether the defendants acted in good faith. Good faith is a complete defense to the charge of making a material false statement to a bank and conspiracy to make material false statements to a bank because good faith on the part of the defendants is, simply, inconsistent with the intent to deceive as alleged in the charges.

A person who acts or causes another person to act on a belief or an opinion held is not punishable under the statute merely because the belief or opinion turns out to be incorrect; inaccurate or wrong. An honest

mistake in judgment or an error in management does not rise to the level of an intent to deceive.

While the term "good faith" has no precise definition, it means, among other things, a belief or opinion honestly held, a literally true statement, and an absence of malice or ill will.

Evidence that the defendants acted in good faith may be considered by you, together with all other evidence, in determining whether or not the defendants acted with the mental state required by statute, *e.g.*, with the intent to deceive.

INSTRUCTION NO. 22

The government must prove beyond a reasonable doubt that defendants did not reasonably believe they had the authority of their wives to sign guarantees submitted to O'Bannon Bank. If you find that the defendants reasonably believed they were authorized to sign their wives' signatures on the guaranty agreements, then you must find that the defendants did not have the specific intent to commit the offense of making a material false statement for purposes of influencing O'Bannon Bank.

INSTRUCTION NO. 23

The government must prove beyond a reasonable doubt each and every element of the offenses charged in the Indictment against Defendant Jerry E. Wells. If the government fails to meet its burden, you must acquit Defendant Wells.

Defendant Wells's theory of the case is as follows:

COUNT I

Defendant Wells contends and has presented evidence that he never entered into any agreement or conspiracy with anyone to make material false statements for the purpose of influencing O'Bannon Bank and Bank IV. Specifically,

(1) Defendant Wells had no intent to make material false statements and did not make material false statements because CMP was disclosed to O'Bannon Bank and Bank IV by Jim Russell and others. Further, that financial statements, which described CMP, were provided to the banks, and that other information regarding CMP was reasonably available to the banks named in Count I;

(2) Defendant Wells, in good faith, believed the statement was literally true, that CMP was not a contractual obligation of the lease contracts, purchased by the banks alleged in the Indictment;

(3) Defendant Wells, in good faith, believed that complete lease contract files were provided by Copytech to O'Bannon Bank and Bank IV, and that he neither directed any employee of Copytech what documents to supply to Bank IV and O'Bannon Bank from the lease files nor directed any employee, or any other person, to withhold information from Bank IV or O'Bannon Bank;

(4) Defendant Wells reasonably believed, in good faith, that he had his wife, Kay's, authority to sign her name to the personal guarantee submitted to O'Bannon Bank;

For you to find Defendant Wells guilty of Count I of the Indictment, the government must prove beyond a reasonable doubt all the essential elements of the crime charged in Count I as to Defendant Wells, and must prove beyond a reasonable doubt that Defendant Wells was not acting in good faith. If the government fails to meet it burden of proof in Count I, you must acquit Defendant Jerry E. Wells.

COUNT II

Defendant Wells Contends and presented evidence that he did not knowingly make a material false statement to O'Bannon. Specifically,

(1) Defendant Wells reasonably believed, in good faith, that he had his wife's authority to sign her name to the personal guarantee submitted to O'Bannon Bank.

For you to find Defendant Wells guilty of Count II of the Indictment, the government must prove beyond a reasonable doubt all the essential elements of the crime charged in Count II as to Defendant Wells, and must prove beyond a reasonable doubt that Defendant Wells was not acting in good faith. If the government fails to meet its burden of proof in Count II, you must acquit Defendant Jerry E. Wells.

INSTRUCTION NO. 24

The government must prove beyond a reasonable doubt each and every element of the offenses charged in the Indictment against Defendant Kenneth R. Steele. If the government fails to meet its burden, you must acquit Defendant Steele.

Defendant Steele's theory of the case is as follows:

COUNT ONE

Defendant Steele contends and has presented evidence with respect to Count One that he never entered into any agreement or conspiracy with anyone to make false statements for the purpose of influencing O'Bannon Bank or Bank IV; that, on the contrary:

(1) He believed that the fact that CMP was paid for by some lessees in their monthly payment was disclosed to all financial institutions and that such information was reasonably available to such financial institutions;

(2) He does not believe that he forged or submitted his wife's forged personal guarantees to O'Bannon Bank on March 28, 1989; and if he signed his wife's signature to her any such personal guarantee, he reasonably believed, in good faith, that he was authorized by his wife, Janice, to sign her name to personal guarantees including the personal guarantees submitted to O'Bannon Bank on March 28, 1989;

(3) Ken Steele reasonably believed complete lease contract files were provided by CopyTech to O'Bannon Bank and Bank IV and he was not involved in directing Barb Kirk Cox or any CopyTech employee what documents to supply O'Bannon and Bank IV from the lease files;

For you to find Defendant Steele guilty of Count I of the Indictment, the government must prove beyond a reasonable doubt all the essential elements of the crimes charged in Count I as to Defendant Steele, and must prove beyond a reasonable doubt that Defendant Steele was not acting in good faith. If the government

fails to meet its burden of proof in Count I, you must acquit Defendant Kenneth R. Steele.

COUNT TWO

Defendant Steele contends and has presented evidence with respect to Count Two that he did not submit his wife's forged personal guarantee to O'Bannon Bank on March 28, 1989; and if he signed his wife's name to any such personal guarantee, he reasonably believed, in good faith, that he was authorized by his wife, Janice Steele, to sign her name to personal guarantees including the personal guarantee submitted to O'Bannon Bank on March 28, 1989.

For you to find the Defendant Steele guilty of Count II of the Indictment, the government must prove beyond a reasonable doubt all the essential elements of the crime charged in Count II as to Defendant Steele, and must prove beyond a reasonable doubt that Defendant Steele was not acting in good faith. If the government fails to meet its burden of proof in Count II, you must acquit Defendant Kenneth R. Steele.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal No. 94-1031-WM
Cross-Appeal No. 93-3924-WM
and No. 93-3932-WM

UNITED STATES OF AMERICA,
APPELLEE/CROSS-APPELLANT

v.

JERRY E. WELLS
AND
KENNETH R. STEELE,
APPELLANTS/CROSS-APPELLEES

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

BRIEF FOR APPELLEE/CROSS-APPELLANT

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* * * * *

Materiality of the CMP Schedule

[28] Defendants next argue that the Government failed to prove beyond a reasonable doubt that the CMP addendum was material as a matter of law, i.e., capable to influencing the purchase of the lease agreements by O'Bannon Bank and Bank IV, because the lease had no false statement and the CMP addendum was a separate agreement.

[29] The officers of three banks testified that the CMP agreement between the lessee and lessor was material in that it had the capacity to influence their decision to buy leases. Tr. 658, 882, 923, 964. Officers of Bank IV and O'Bannon Bank testified that the banks would not have bought the leases had they known of the CMP obligations of the lessor. Tr. 658, 923. This is clearly enough evidence for the court to find materiality.

The defendants also claim that they should have been permitted to present expert witness as to the materiality issue.[52] The Eighth Circuit has held the issue of materiality in false statements charges brought under 18 U.S.C. § 1014 is a question of law for the trial court to decide and it is proper for the court to inform the jury that the allegedly false statements have been found to be material as a matter of law. *United States v. Ribaste*, 905 F.2d 1140, 1143 (8th Cir. 1990). The testimony was presented to the trial court

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[52] The defendants cite *United States v. Lueben*, 816 F.2d 1032, 1033 (5th Cir. 1987) on this point. However, that case is distinguishable from these facts because the district court in that case did not allow the expert to make a proffer on the issue of materiality. That was not the situation here. Tr. 1064-1083.

and the court rejected it. The court found the lease agreements and the guaranty agreements material. Tr. 1737. The evidence adduced at trial clearly supports the court's finding that the CMP addendum and the personal guaranties were material. The defendants' appeal fails with respect to this argument. Therefore, the Court should uphold the conviction on Count I.

* * * * *

[32]

II. THE COURT PROPERLY DENIED DEFENDANTS' MOTIONS FOR JUDGMENT OF ACQUITTAL ON COUNT I BECAUSE IT ALLEGED AND PROVED A VIOLATION OF 18 U.S.C. § 1014 AS A MATTER OF LAW.

The defendants claim that the failure to provide the CMP addenda was not an affirmative act or misrepresentation, that 18 U.S.C. § 1014 requires an affirmative act or misrepresentation be made, and therefore the defendants could not have violated the statute or been convicted under Count I. Count I charges the defendants with conspiring to make false statements to banks knowing the statements to be false and withholding information of material fact from the banks. Ap. 35-42. A statement or representation is "false" when it is untrue when made or when it effectively conceals a material fact. *See, e.g., United States v. Haddock*, 956 F.2d 1534, 1551 (10th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 88 (1992).

The purpose of Section 1014 is to protect authorized functions of specified institutions from "deceptive practices." *United States* [33] v. *Gilliland*, 312 U.S. 86, 93 (1941); *Kovens v. United States*, 338 F.2d 611, 616 (5th Cir. 1964), *cert. denied*, 380 U.S. 976 (1965).

The courts have repeatedly rejected restrictive constructions of the statute, deeming it designed to protect against a broad variety of schemes that may influence a bank "in any way." *See, e.g., United States v. Payne*, 602 F.2d 1215, 1219 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980). "Section 1014 'is not merely directed to false statements which are actually used in the decision to make a loan. *It requires that all statements supplied to lending institutions . . . , which have the capacity to influence them, be accurate or at least not knowingly false . . .*'" *United States v. Kindig*, 854 F.2d 703, 706 (5th Cir. 1988), *quoting United States v. Goberman*, 458 F.2d 226, 229 (3d Cir. 1972) (emphasis in original).

Concealing material information from a bank for the purpose of influencing it is a crime under 18 U.S.C. § 1014. Like § 1014, in 18 U.S.C. § 1005 (making false entries, reports or statements to financial institutions with intent to defraud) the term "conceal" or "omit" does not appear in the language of the statute. Nevertheless, the Eighth Circuit found that omission in a § 1005 prosecution can be a "false entry" where an honest entry would otherwise be made. *See United States v. Copple*, 827 F.2d 1182, 1187 (8th Cir. 1987), *cert. denied*, 484 U.S. 1073 (1988).

Obviously, failing to disclose or concealing material information from a bank can result in an affirmative assertion, misrepresentation or false statement under § 1014.[55] Courts have broadly interpreted the

[55] The defendants cite *Williams v. United States*, 458 U.S. 279, (1982) for the proposition that false statements which may support a conviction under 18 U.S.C. § 1014 must be an affirmative assertion of a factual statement. The *Williams* case involves the writing of a bad check and specifically finds that checks are not factual statements. Most courts have declined to read *Williams* broadly to require the reversal of convictions in situations other than those involving insufficient-funds checks. *See, e.g., United States v. Hord*, 6 F.3d 276, 286 (5th Cir. 1993); *United States v. Falcone*, 934 F.2d 1528 (11th Cir. 1991), *cert denied*, ___ U.S. ____, 113 S. Ct. 292 (1992); *United States v. Bonnett*, 877 F.2d 1450 (10th Cir. 1989); *United States v. Worthington*, 822 F.2d 315, 319 (2d Cir.), *cert. denied*, 484 U.S. 944 (1987); *United States v. Price*, 763 F.2d 640 (4th Cir. 1985).

section to cover various types of acts and misrepresentations as statements. *See, e.g., United States v. Haddock*, 956 F.2d 1534 (10th Cir. 1992) (evidence that defendant failed to disclose line of credit sufficient to convict under § 1014); *United States v. Trexler*, 474 F.2d 369, 370-71 (5th Cir.), *cert. denied*, 412 U.S. 929 (1973) (in a § 1014 prosecution, the jury could consider what "a defendant does or fails to do", it is not limited to affirmative acts); *United States v. Sackett*, 598 F.2d 739, 740-42 (2d Cir. 1979) (in § 1014 prosecution, there was sufficient evidence for the jury to convict for omitting information orally on loan application); *United States v. Trice*, 823 F.2d 80 (5th Cir. 1987) (failure to disclose material information needed to avoid deception in connection with loan transactions covered by § 1014 constitutes a false statement or report within the meaning of the statute and thus violates the statute); *United States v. Ryan*, 828 F.2d 1010, 1017 (3d Cir. 1987) (fact that a word was not spoken or written does not necessarily mean that a message was not [35] sent and received; under § 1014 a statement includes assertive "nonverbal conduct"); *United States v. Concemi*, 957 F.2d 942, 959-61 (1st Cir. 1992) (HUD-1 certificates which omit information about second mortgage constitute "statement" for § 1014 purposes).

Likewise, concealing the existence of the CMP addendum was sufficient to constitute a false statement in light of the language in the related lease contract. Initially, when the defendants disclosed CMP to a bank, the bank either required an escrow account or did not purchase any leases. Thereafter, the defendants agreed to conceal the "soft costs" (CMP addendum). Based on Russell's testimony, there is no question that the defendants agreed and intended to make false statements to financial institutions. The testimony at trial revealed Wells deleted all reference to CMP from the CSI lease contracts and created a separate addendum which was never provided to banks. If the CMP addenda had been provided to the banks, it would have been clear to the banks that service of the equipment was truly the *lessor's* responsibility and the lease agreement was, in fact, *not* the only agreement. Withholding the CMP schedules concealed a material fact, and the lease contracts as provided to the banks provided false information and were misleading. Clearly, the trial court properly denied the defendants' motions for judgment of acquittal as to Count I because the charged offense constituted a violation of 18 U.S.C. §§ 371 and 1014.

* * * * *

[41]

VI. THE EVIDENCE PRESENTED AT TRIAL TOGETHER WITH ALL REASONABLE INFERENCES FAVORABLE TO THE GOVERNMENT WAS SUFFICIENT AS A MATTER OF LAW TO SUPPORT A GUILTY VERDICT ON COUNT II.

The defendants were convicted under Count II of knowingly submitting forged guaranties of their spouses to O'Bannon Bank in violation of 18 U.S.C. § 1014. The defendants assert that the Government failed to prove beyond a reasonable doubt the elements of the offense of making a false statement to a bank, specifically, the intent and materiality elements. When reviewing for sufficiency of the evidence, the evidence is viewed in the light most favorable to the verdict and accept as established all reasonable [42] inferences supporting the verdict are accepted as established. *United States v. Rodriguez*, 812 F.2d at 416; *United States v. Plenty Arrows*, 946 F.2d 62, 64 (8th Cir. 1991). The verdict is upheld if there is substantial evidence to justify an inference of guilt and is overturned only if the evidence is such that a reasonable juror *must* have a reasonable doubt as to the existence of one of the essential elements of the crime. *United States v. Penn*, 974 F.2d 1026, 1028 (8th Cir. 1992).

Intent

The defendants suggest that the Government did not prove beyond a reasonable doubt that the defendants did not have authority, or a reasonable, good faith belief that they had authority, to sign their spouses' signatures on the O'Bannon Bank personal guaran-

ties.[63] However, the Government introduced evidence concerning the defendants' lack of authority to sign the guaranties on behalf of their wives. The defendants simply refuse to accept that the jury rejected their testimony.

The issue of intent is particularly within the province of the jury and its function is to weigh the evidence, draw reasonable inferences therefrom, and evaluate witness credibility. *United* [43] *States v. Whitman*, 665 F.2d 313, 318 (10th Cir. 1981). Witness credibility is a question of fact for the jury. *United States v. Big Crow*, 898 F.2d 1326, 1329 (8th Cir. 1990). Proof of intent through use of circumstantial evidence is not unusual. *See, e.g., United States v. Miller*, 573 F.2d 388, 391 (7th Cir. 1978).

The evidence at trial revealed the three owners met alone in Russell's office at CSI to sign the guaranties. Tr. 185. Russell warned Wells and Steele that he was sure that his wife would not sign the guaranty. Tr. 185. Wells knew that O'Bannon required the guaranties to be signed by both husbands and wives. Tr. 185, 1190, 1322. However, Wells informed Russell he should sign for his wife because if he were later sued, the bank could not claim their

[63] The defendants cite *United States v. West*, 666 F.2d 16 (2d Cir. 1981) in support of their argument. In the *West* case, the court failed to submit an instruction which dealt with the issue of the Government proving beyond a reasonable doubt that the defendant did not reasonably believe he had authority from his wife to sign. Unlike that case, the trial court submitted Instruction 22, instructing the jury that the defendants did not reasonably believe they had their wives' authority to sign guaranties on their behalf. Ap. 29. The jury obviously resolved the credibility question against defendants Wells and Steele as evidenced by their verdict.

joint property because of "joint tenancy of the entirety," that is, the property would be owned by both parties. Tr. 185-86.

While the defendants were joking about who signed whose wife's name the best, the personal guaranties went around the office and the defendants signed the wives' names. Tr. 186. Kirk-Cox testified that she walked into Russell's office and observed Wells, Steele and Russell signing their wives' names. Tr. 448-49. At that time, Steele said both he and Wells had signed their wives' names before and Wells signed Steele's wife's name better than he did. Tr. 186. The defendants stipulated that the wives' signatures were not authentic.[64] Tr. 618-20.

At trial, Russell identified each of the March 28, 1989 [44] guaranties that were submitted to O'Bannon Bank as being the guaranties that were signed during that meeting. Tr. 187. Both the defendants had substantial prior experience in the banking industry and knew the importance of having authentic signatures. Although the evidence may not have eliminated every possibility inconsistent with guilt, there was substantial testimony from which the jury could properly conclude that the defendants knowingly and willfully submitted the forged guaranties of their wives in order to influence O'Bannon Bank.[65]

[64] Neither defendant testified that they were in any hurry to have the guaranties signed by either wife or that either wife was unavailable to sign.

[65] The Government attempted to offer as rebuttal evidence the fact that both defendants had, in fact, attempted to assert the forged guaranties as a defense to collection efforts by the bank in a subsequent civil suit brought prior to the filing of the criminal charges. However, the trial court would not permit the Government to introduce the evidence. Tr. 1733-35.

The Government submits that the evidence supports the inference of an unlawful intent with respect to the false signatures of the spouses on the O'Bannon Bank guaranties. Viewing the evidence in the light most favorable to the Government, it is clear that the defendants did not intend to bind their wives to the guaranties when they forged their spouses' signatures.

Furthermore, even if the jury found that Wells and Steele had a reasonable, good faith belief that they had authority to sign their own wives' names, the jury could still have found beyond a reasonable doubt that the defendants forged the signatures of Janice C. Steele and Kay Wells in violation of 18 U.S.C. § 1014. The testimony revealed each defendant did not sign the name of his wife. Rather, Wells signed Janice Steele's name and vice versa. [45] The jury obviously rejected the defendants' testimony and could conclude that the defendants signed the other's wife's name and that each defendant did not have authority to do that.[66]

Clearly, there is sufficient evidence to sustain the Government's burden of proof that the defendants possessed the requisite intent to commit the crime charged. *See United States v. Kroh*, 915 F.2d 326, 328 (8th Cir. 1990) (adopting in part *United States v. Kroh*, 896 F.2d 1524, 1530 (8th Cir. 1990)). The defendants' attack on the sufficiency of the evidence comes down to whether the jury should have believed the Government's witnesses or their own. Questions of weight and credibility are for the jury. *United States v. Neavill*, 868 F.2d 1000, 1006 (8th Cir. 1989).

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[66] It should be noted that neither spouse testified in support of the defendants' testimony on this issue.

Materiality

The defendants allege that the Government failed to prove that the spouses' forged signatures were material. In support, defendants contend that the guaranties were not material because some lease contracts were purchased by O'Bannon Bank in February 1989 while the guaranties were not signed until March 28, 1989.

In determining whether a false statement is material, the test is whether it has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made. *Blake v. United States*, 323 F.2d 245, 256 (8th Cir. 1963); *see United States v. Braverman*, 522 F.2d 218, 223-24 (7th Cir.), *cert. denied*, 423 U.S. 985 (1975). The fact that [46] Hayes agreed to purchase leases before the guaranties were actually received is irrelevant since materiality does not depend on actual reliance. *United States v. Whitman*, 665 F.2d at 318; *United States v. Shriver*, 842 F.2d 968, 976 n.11 (7th Cir. 1988); *see e.g., United States v. Kindig*, 854 F.2d 703, 706 (5th Cir. 1988) (element of § 1014, as a matter of law, can be made out when false documents not furnished after bank had made loan); *see also United States v. Johnson*, 937 F.2d 392, 396 (8th Cir. 1991) (in 18 U.S.C. § 1001 prosecution, proof of actual reliance by Government not necessary).

O'Bannon Bank required each owner and his spouse to sign a Personal Unconditional Guaranty in order to fund CSI's lease contracts.[67] Tr. 185, 197, 214, 626, 630, 631. The testimony revealed the bank gave equal

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[67] In Missouri, if a bank seeks to recover a married couple's personal assets, a guaranty is required that is signed by both the husband and the wife. Tr. 1323.

weight to the credit strength of the lessee, the repurchase agreement, and the personal guaranties of the principals. Tr. 687. Prior to receiving the guaranties, some contracts were "funded" by O'Bannon with the understanding that the guaranties would be provided at a later time. Tr. 732.

In response to the question of whether the forged guaranties [47] had the capacity to influence the actions of O'Bannon Bank, Hayes unequivocally stated that if he had known the signatures of the wives were not their genuine signatures, O'Bannon Bank would not have had any credit transactions of any kind with CSI because it required the genuine signatures of the owners and their wives. Tr. 632. The Eighth Circuit has held the issue of materiality in false statements charges brought under 18 U.S.C. § 1014 is a question of law for the trial court to decide. *United States v. Ribaste*, 905 F.2d at 1143. The evidence presented, taken as a whole and viewed in the light most favorable to the Government, is clearly sufficient. Tr. 1737. The defendants' appeal fails on this argument.

* * * * *

[seal omitted]

U.S. Department of Justice

United States Attorney
Western District of Missouri

Financial Fraud Section
1201 Walnut, Suite 2300
Kansas City, Missouri 64106-2149

July 3, 1995

Michael E. Gans
Clerk of the Court
United States Court of Appeals
for the Eighth Circuit
1114 Market Street
St. Louis, MO 63101

Re: United States v. Jerry Wells, et al.
No. 93-3924/93-3932/94-1031WMJ

Dear Mr. Gans:

On Thursday, June 22, 1995, this office received an order entered at the direction of the Court directing the United States to submit a letter brief commenting on the affect of the ruling in the case *United States v. Michael E. Gaudin*, 1995 WL 360212 (U.S.) on *United States v. Jerry Wells, et al.*, 93-3924/93-3932/94-1031WMJ. The United States addresses the affect of the *Gaudin* ruling on the conviction under Count Two of the Indictment for violation of 18 U.S.C.

§1014.[1] The Supreme Court in *Gaudin* held that the Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt on every element of the crime with which he is charged; thus, the trial judge's refusal to allow the jury to pass on the "materiality" of Gaudin's false statement infringed on that right.

MATERIALITY IS NOT AN ESSENTIAL ELEMENT OF 18 U.S.C. §1014

Justice Rehnquist's concurring opinion puts the holding of this case into perspective when he states "there are issues in this area of law which . . . are not disposed of by the Court today . . . . Whether 'materiality' is indeed an element of every offense under 18 U.S.C. §1001 is not at all obvious from its text." *Gaudin*, 1995 WL 360212, at p. 11. He specifically states that the Court does *not* resolve the conflict of whether "materiality" refers only to the first clause of §1001, omissions, or whether it refers to both clauses of §1001, omissions and affirmative

[1] Defendants Wells and Steele were convicted under Count One of the Indictment of 18 U.S.C. §371. A conviction under 18 U.S.C. §371 requires the jury to find beyond a reasonable doubt that there was an agreement to violate the law and that an overt act in furtherance of the conspiracy was completed. *See, e.g., United States v. Hoelscher*, 764 F.2d 491, 494 (8th Cir. 1985). Both the conspiracy and overt acts, such as the submission of the wives' forged guaranties, were proven. Conspiring to commit a crime is an offense separate and distinct from the crime which may be the object of the conspiracy. *Pereira v. United States*, 347 U.S. 1, 11 (1954). Accordingly, a finding of materiality on this count is not required. Therefore, the conviction under Count One is unaffected by the Supreme Court's ruling in the *Gaudin* case.

false statements.[2] *Id.* Based on the concessions of the Government in the *Gaudin* case, the Court "merely assumes that materiality is, in fact, an element of the false statement clause of §1001."[3] *Id.* However, Justice Rehnquist points out that the Supreme Court has note that " '[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.' " *Staples v. United States*, 114 S. Ct. 1793, 1796 (1994) (quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)).

Unlike 18 U.S.C. §1001 (the offense of conviction in the *Gaudin* case), the plain language of 18 U.S.C. §1014[4] does not include the term "material". Indeed,

[2] This premise is supported by court which have specifically held that materiality is not an element of making a false statement. *See, e.g., United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir.); *cert. denied*, 469 U.S. 822 (1984).

[3] The conviction under Count Two was based on a false statement (not a material fact that was concealed or omitted), that is, the owners submitted guaranties to O'Bannon Bank which falsely claimed that the wives would guaranty the bank's purchase of the leases; however, this was untrue because, as the jury found, the owners' wives' signature were forged. Here, the United States does not concede that materiality is an essential element of §1014.

[4] 18 U.S.C. §1014 states, in pertinent part:

Whoever knowingly makes any false statement or report, . . . for the purpose of *influencing in any way* the action of . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of

the Supreme Court's holding in *Kay v. United States*, 303 U.S. 1, 5-6 (1938), addressed a direct predecessor statute with the identical pertinent language and held that an alleged lack of materiality of a false statement intended to deceive was not a defense. Despite the statutory language of §1014, courts have assumed that materiality is an element when determining whether a crime has been committed under the statute. *United States v. Shriver*, 842 F.2d 968, 976-77 (7th Cir. 1988). Courts have inferred the judge-made limitation of "materiality" in order to exclude trifles from its coverage. *See, e.g., United States v. Corsino*, 812 F.2d 26, 30 (1st Cir. 1987) (referring to §1001). Because the legislature did not include materiality in 18 U.S.C. §1014, the definition of the elements of the criminal offense cannot include materiality and the jury's failure to deliberate on that issue cannot trigger the Fifth and Sixth Amendments of the Constitution.

In general, a statement is false if it is untrue at the time it was made, or it was made with reckless indifference as to its truth or falsity, and it was made with an intent to deceive.[5] *See United States v. Marley*, 549 F.2d 561 (8th Cir. 1977). Under 18 U.S.C. §1014 the only intent necessary is an intent to influence the bank, not an intent to harm the bank or

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security therefore, shall be [guilty of a crime]. (emphasis added).

[5] As the basis for the conviction under Count Two, the banker at O'Bannon Bank testified that a personal guaranty was required from the owners and their wives in order to fund CSI's lease contracts and that he had known the signatures on the guaranties were not genuine, he would not have had credit transactions of *any* kind with CSI. Tr. 630-32.

profit personally. *United States v. Whitman*, 665 F.2d 313, 318 (10th Cir. 1981); *see also United States v. Sabatino*, 485 F.2d 540 (2d Cir. 1973), *cert. denied*, 415 U.S. 948 (1974); *United States v. Wilcox*, 919 F.2d 109, 112 (9th Cir. 1990) (making false statement with intent to influence prohibited regardless of motive). Section 1014 is not dependent upon the accomplishment of that purpose, and thus is a crime of subjective intent (requiring neither reliance by the bank officers nor an actual defrauding). *See United States v. Thompson*, 811 F.2d 841, 844 (5th Cir. 1987); *see also, United States v. Davis*, 953 F.2d 1482, 1495 (10th Cir.), *cert. denied*, 112 S. Ct. 2286 (1992); *United States v. Copple*, 827 F.2d 1182, 1187 (8th Cir. 1987), *cert. denied*, 484 U.S. 1073 (1988) (proof that bank was influenced by or actually relied on the false statement is not necessary for §1014 violation). Therefore, materiality is not an element which must be proven beyond a reasonable doubt by to the jury to establish a defendant's guilt.

The legislature's intention regarding the issue of materiality is obvious. First, the term "material" is not included in the statute. Second, the intent required in the statute is incompatible with a finding of materiality by the jury. "Materiality" (or "capacity to influence"[6]) is determined by the affect the statement has or could have *on the person to whom the false statement is made.* However, statutorily, the intent element of §1014 is accomplished by the subjective intent *of the person making the false state-*

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[6] The "Notes on Use" section of instruction 6.18.1014 state that materiality is tested by the "capacity to influence." *See also, United States v. Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992).

ment, that is, his desire to influence the bank officer (whether or not an actual reliance by a bank officer occurs). Therefore, a request for the jury to find that false statements are material under §1014 misstates the law. *See, e.g., United States v. Cleary*, 565 F. 2d 43, 46 (2d Cir. 1977), *cert. denied*, 435 U.S. 915 (1978). It does not lie with one knowingly making false statements with intent to mislead a banker to say that the statements were not influenced or the information not important. *Id.*; *Kay v. United States*, 303 U.S. at 5-6; *United States v. Blumenthal*, 945 F.2d 280, 282 (9th Cir. 1991). Therefore, under §1014, the statutory intent (which requires the jury to focus on the defendant making the false statement) is incompatible with "materiality" or "capacity to influence" (which would require the jury to focus on the person to whom the statement is directed; however, reliance, by law, is not required).

Accordingly, materiality is not an essential element of the crime which must be submitted to the jury.[7] The determination of materiality is a judicial expansion of the elements which, because it is judicial

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[7] Other instructions in the 8th Circuit Model Criminal Jury Instructions involving fraud and contemplating false statements (as opposed to a concealment) do not specifically set forth "materiality" as an essential element. *See, e.g.*, 6.18.1005, 6.18.1006A, 6.18.1341 (also referring to 18 U.S.C. §1343), 6.18.1344. Other statutes involving false statements have been found not to include "materiality" as an element for the jury. *See, e.g., United States v. Hoag*, 823 F.2d 1123 (7th Cir. 1987) (under §1010 statute in which word "material" does not appear, jury not required to find that element); *United States v. White*, 27 F.3d 1531 (11th Cir. 1994)(under §287 statute, term "material" does not appear and jury not required to find that element).

and not statutory, does not trigger the Fifth and Sixth Amendments of the Constitution concerning the jury's failure to deliberate and the convictions should be upheld.

FAILURE TO DELIBERATE ON THE ISSUE OF MATERIALITY WAS HARMLESS ERROR

Here, even if the Court determines that materiality is an element of §1014 which must be proven to the satisfaction of the jury beyond a reasonable doubt, the error was harmless and the convictions should be upheld.[8] The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. *Sullivan v. Louisiana*, 113 S.Ct. 2078, 2080 (1993). The Supreme Court has applied harmless error analysis to a wide range of errors and has recognized that most constitutional error can be harmless. *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). In particular, the Supreme Court has subjected jury instructions plagued by constitutional error to harmless-error analysis. *See, e.g., Yates v. Evatt*, 500 U.S. 391, 402 (1991); *Pope v. Illinois*, 481 U.S. 497, 502-04 (1987). This broad application of the harmless error doctrine is designed to conserve judicial resources by avoiding retrial if it can be said beyond a reasonable doubt that the jury's verdict was not affected by the erroneous instruction. *Id.* at 502.

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[8] In the *Gaudin* case, the Government did not argue before the Supreme Court that the error in its case was harmless and thus the Court had not occasion to review the Court of Appeals' conclusion. *Gaudin*, 1995 WL 360212, at p. 12.

The test for determining the materiality of a false statement is whether it had the capacity to influence. *See United States v. Haddock*, 956 F.2d 1534, 1550-51 (10th Cir.), *cert. denied*, 113 S. Ct. 88 (1992); *United States v. Shriver*, 842 F.2d at 976 n. 11.[9] Obviously, the jury, if the instruction on materiality were submitted to the jury, would have found that the guaranties not only had the capacity to influence the bankers but that they *actually* influenced the bankers because they acted. James Hayes testified that his bank required each owner and his spouse to sign a Personal Unconditional Guaranty in order to fund CSI's lease contracts. Tr. 630-31. Prior to receiving the guaranties, some contracts were "funded" by O'Bannon Bank with the understanding that the guaranties would be provided at a later time. Tr. 732. In response to the question of whether the forged guaranties had the capacity to influence the actions of O'Bannon Bank, Hayes unequivocally stated that if he had known the signatures of the wives were not their genuine signatures, O'Bannon Bank would not have had any credit transactions of any kind with CSI because it required the genuine signatures of the owners and their wives. Tr. 632. There is no credible evidence in the record to support the defendants' contention that the bankers acted for *any* reason other than the fact that they received the forged guaranties of the defendants' wives as a condition of doing business with CSI.

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[9] The United States herein incorporates by reference the sections relating to factual matters considering materiality which were previously set forth in its "Brief for Appellee/ Cross-Appellant", and with particular focus on pp. 27-29 and 45-47.

In this case, the evidence was overwhelming against the defendants on the other essential elements of the crime of making a false statement and conspiracy to do the same.[10] The materiality of the defendants' false statements have also been clearly established. Therefore, the failure to submit the issue to the jury was harmless beyond a reasonable doubt under the standard of *Chapman v. California*, 386 U.S. 18, 24 (1967). *See United States v. Valdez*, 594 F.2d 725, 728 (9th Cir. 1979). No reasonable jury could have reached any other conclusion. Therefore, the convictions of Defendants Wells and Steele on all counts should be upheld by the Court.

Sincerely yours,

Stephen L. Hill, Jr.
United States Attorney

By /s/ MARK C. THOMPSON

MARK C. THOMPSON
Assistant United States Attorney

cc: James Wyrsch, Esquire

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[10] After an eight day trial, the jury returned guilty verdicts in less than 2 1/2 hours on both the counts that were submitted.

WYRSCH ATWELL MIRAKIAN LEE & HOBBS, P.C.
ATTORNEYS AT LAW
1300 MERCANTILE TOWER
1101 WALNUT
KANSAS CITY, MISSOURI 64106-2122

July 5, 1995
(Via Hand Delivery)

Michael Gans, Clerk
U.S. Court of Appeals
for the Eighth Circuit
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

In re: United States v. Wells and Steele, Case Nos. 93-3924, 93-3932, 94-1031WMJ

Dear Mr. Gans:

A. INTRODUCTION

This letter brief is sent to the Court pursuant to the Court's Order of June 22, 1995 directing the parties in the above referenced appeals to file five copies of letter briefs not to exceed five pages, on or before

July 5, 1995, upon the effect of *United States v. Michael E. Gaudin*, No. 94-514, 19095 WL 360212 (U.S. June 19, 1995). Enclosed please find five copies of letter brief submitted on behalf of the Appellants, Jerry E. Wells and Kenneth Steele, hereinafter referred to the "Defendants."

B. RECORD BELOW

Defendants respectfully suggest that the *Gaudin* opinion requires reversal of the convictions under Counts I and II of the Indictment in this case. Count I of the Indictment in this case and as submitted to the jury charged Defendants with making material false statements to various banks in violation of 18 U.S.C. §§ 371, 1014 and 2. (A. at pp. 29-36.)[1] Count II as charged and submitted to the jury involved the Defendants knowingly submitting forged guarantees of their spouses to O'Bannon Bank in violation of 18 U.S.C. § 1014. (A. at pp. 36-37.) However, Defendants submit that, with regard to both Counts I and II, the court instructed the jury that it had determined that any false statements were material as a matter of law. Defendants' objections in this regard were overruled by this Court. See Tr. pp. 1736-1749. There were also objections by the Defendants to the court telling the jury that he had determined certain statements to be material as a matter of law. (Tr. pp. 1737-1739.) The objections to not instructing the jury on the issue of materiality and otherwise were also made under the

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[1] References to the Trial Transcript will hereinafter be cited as "Tr. p. " to the Appendix as "A. at p. "; to the *Gaudin* Opinion as "Op. p. ", and to the Addendum to this letter brief as "Add. at p. ."

sixth and fifth amendments to the United States Constitution. See, *e.g.*, Tr. p. 1739. Over Defendants' objections (and with the court also indicating that materiality in this case should be a factual issue for the jury), the trial court made a declaration at the close of all of the evidence under both counts of the Indictment as submitted to the jury that the financial reports of Copytech were material, that the lease agreements were material, and that the guarantees signed were also material. Instruction 15 (A. at pp. 91-93), regarding Count I, did not define materiality, although there was a mention of materiality under Elements One, 4b (material false lease agreements were submitted to O'Bannon Bank, and material portions of the lease contracts—CMP schedules—were not submitted to the O'Bannon Bank), and 40 (materially false lease contracts were submitted to Bank IV and material portions of the lease contracts —CMP schedules—were not submitted to Bank IV). Under paragraph 4a of Instruction 15, which is identical factually to the submission under Count II (A. at pp. 94-95), there was no submission of materiality to the jury, *i.e.*, false personal guarantees to O'Bannon Bank. Instruction No. 18 (Add. at p. 26), given by the court to assist the jury in making a decision under Count I, set forth the elements of the offense under 18 U.S.C. § 1014. Element Two of this Instruction stated: "that the defendant made or caused to be made a false statement to the bank knowing that it was false, or withheld information of material fact from the bank." The court in Instruction 18 also explained that Count I involved false statements to both O'Bannon Bank and Bank IV. No definition of materiality was ever given to the jury under either Count I or Count II. In Instruction 20, the court gave the

following instruction to the jury: "The materiality of the statement or representation alleged to be false or concealed is not a matter with which you are concerned and should not be considered by you in determining the guilt or innocence of the defendant."[2]

C. THE GAUDIN OPINION

In *United States v. Gaudin*, the Supreme Court held that the fifth and sixth amendments to the United States Constitution require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime in which he is charged. *Gaudin* was a prosecution under 18 U.S.C. § 1001. In this prosecution, the government conceded that materiality is an element of the offense that the government must prove under § 1001. See pp. 3-5 of the Opinion. The Court held that materiality should have been submitted to the jury for its determination. (Op. pp. 4-10). The Supreme Court affirmed the Ninth Circuit opinion in this regard, which held that it was "plain error" for the court to fail to submit the issue of materiality to the jury. 28 F.3d at 943, 951-52 (9th Cir. 1994). The concurring opinion in *Gaudin* indicated, at p. 13, that

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[2] Attached as an addendum to this letter brief are Instructions 1-26, as the Court may want to look at all of the instructions to make its decision in this case. Counsel also will be asking the United States District Court to submit the entire instructions given to the Court as a supplemental appendix, as well as, if appropriate, the Defendants' refused Instructions A-E, one or more of which may touch upon the materiality issue. Instructions 12, 13, 15, 18, 22, 23 and 24 also appear in the Government's Appendix at pp. 17-33.

the government had not argued that the error in this case was either harmless or not plain.

D. DISCUSSION

There appears to be no reason to treat § 1001 prosecutions differently than prosecutions under 18 U.S.C. § 1014 for purposes of the decision in *Gaudin*. *See United States v. Staniforth*, 971 F.2d 1355, at 1357-1358 (7th Cir. 1992) (although the court does not decide the issue, at p. 1359). This Court, in *United States v. Ribaste*, 905 F.2d 1140, 1143 (8th Cir. 1990), as well as many other circuits, has held that materiality is an essential element of the offense under § 1014. *See United States v. Staniforth, id.* at 1358. *See also*, Manual of Model Criminal Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.18.1014, at pp. 224-25 (West 1994 ed.). In *United States v. Ribaste*, the court held it was proper for the court to inform the jury that the allegedly false statements have been found to be material as a matter of law, at p. 1143.

Thus, it is clear that the *Gaudin* opinion requires reversal of Counts I and II for failure to submit materiality to the jury. The Instruction submitting Count II (No. 20) clearly withdrew materiality from the jury and the language in Count II in this regard clearly applied to the submission under Count I (Instructions 15 and 18). In fact, in Instruction 18, the court told the jury "In these instructions I define the elements of making a false statement to a bank in relation to the charges that the defendants made false statements to a bank. You may use these definitions in considering whether the defendants conspired to make false statements to the banks, keeping in mind

that the charges in Count One charge a conspiracy to make false statements and not that the crime of making a false statement was committed." (Add. at p. 26.) This paragraph of Instruction 18 was modeled after Eighth Circuit Pattern Instruction 5.06C, Note on Use 4, and was meant to clearly refer to Instruction 20, including, it is respectfully submitted, the reference in Instruction 20 to materiality. The court chose not to define materiality, which was consistent with its determination to withdraw materiality from the jury. Moreover, Instruction No. 15 in paragraph 4a did not even mention the word materiality. The court's Instructions relieved the government of its burden of persuasion beyond a reasonable doubt of every essential element of the crime. Thus, it is clear that the Instructions as a whole were erroneous. *Francis v. Franklin*, 471 U.S. 307 (1985). CF *Karras v. Leapley*, 974 F.2d 71 (8th Cir. 1992) (court defines issue as whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the constitution; general instructions, for instance, do not dissipate error in challenged portions of instruction).

E. RETROACTIVITY OF GAUDIN

In the leading case of *Griffith v. Kentucky*, 479 U.S. 314 (1987), a majority of the Court held that failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication. At p. 322. *See e.g. United States v. One Parcel of Real Property*, 27 F.3d 327, at pp. 329-30 (8th Cir. 1994). Since this case is on direct appeal, the holding of *Gaudin* applies and requires reversal.

F. PLAIN ERROR ISSUE

There is, under the facts of this case, no "plain error" as the matter was adequately preserved in the lower courts and is now briefed on appeal. Initially, because of existing law in this circuit, the issue was not briefed. *See, e.g.*, Eighth Circuit Pattern Instruction No. 6.18.1014, Notes on Use 1. However, the Court has given both parties the opportunity to brief the issue. In any event, if a "plain error" analysis were to be applied, it was plain error for the trial court in this case not to instruct the jury on the issue of materiality. *United States v. Gaudin*, 28 F.3d 943, 951-52 (9th Cir. 1994). *See also United States v. Bencs*, 28 F.3d 555, 564 (6th Cir. 1994) (plain error when court failed to instruct jury that knowledge of illegality of restructuring was necessary component of unlawful restructuring to evade transaction reporting requirements), *cert. denied*, 115 S.CT. 915 (1995).

G. HARMLESS ERROR

The error in this case was not harmless. Given the fact that there was constitutional error, there must be a showing, beyond a reasonable doubt, that the error did not contribute to the verdict for there to be harmless error. *Chapman v. California*, 386 U.S. 18, 22 (1967); *United States v. Schrader*, 10 F.3d 1345, 1348-50 (8th Cir. 1993) (reversal required when erroneous instruction allowed jury to convict defendant without finding one element of the crime charged). In *Schrader*, at p. 1349, fn 1, the court cited to *United States v. Voss*, 787 F.2d 393, 398 (8th Cir.), *cert. denied*, 479 U.S. 88 (1986), which questioned, without deciding the issue, whether an instruction permitting

the jury to convict without properly finding each element of the crime may ever be harmless error. *See generally, United States v. Olano*, 113 S.Ct. 1770 (1993); *United States v. Retos*, 25 F.3d 1220, at pp. 1230-32 (3rd Cir. 1994). Defendants would also specifically refer to the Court to not only the trial court's concerns that materiality was a jury issue (Tr. pp. 1736, 1737), but also Defendants' briefing on the materiality issue in this Court, particularly their initial brief at pp. 39-43 and 49-51, which clearly shows how materiality was in fact sharply contested both at the trial and on appeal in this case.

H. CONCLUSION

In view of the foregoing, it is respectfully submitted to the Court that, based on the *Gaudin* decision, the convictions under both Counts I and II for both Defendants must be reversed and remanded for a new trial.[3]

Respectfully submitted,

WYRSCH ATWELL MIRAKIAN LEE
& HOBBS, P.C.

By: /s/ JAMES R. WYRSCH

JAMES R. WYRSCH

CC: Matt Whitworth (Via Hand Delivery)
Mark Thompson (Via Hand Delivery)

[3] The relief prayed for is in addition to the relief prayed for in Defendants' briefs before this Honorable Court.

(5)

Supreme Court, U.S.
FILED
JUN 13 1996

No. 95-1228

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

JERRY E. WELLS AND KENNETH R. STEELE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
PAUL A. ENGELMAYER
Assistant to the Solicitor General
WILLIAM C. BROWN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

32 pp

QUESTION PRESENTED

Section 1014 of Title 18 imposes criminal penalties on a person who "knowingly makes any false statement or report * * * for the purpose of influencing in any way the action," *inter alia*, of a federally insured bank. The question presented is whether the materiality of the false statement or report is an element of the offense described by Section 1014.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory provision involved	2
Statement	3
Summary of agument	9
Argument:	
The materiality of the false statement or report is not an element of the offense defined by 18 U.S.C. 1014	11
A. Imputing a materiality requirement to Section 1014 is inconsistent with the text and history of the statute and this Court's decision in *Kay* v. *United States*	12
B. There is no basis for imputing a materiality element to Section 1014	20
Conclusion	26

TABLE OF AUTHORITIES

Cases:

Kay v. *United States*, 303 U.S. 1 (1938)	9-10, 11, 17, 18, 23
Kungys v. *United States*, 485 U.S. 759 (1988)	10, 19, 20, 22, 23
Liparota v. *United States*, 471 U.S. 419 (1985)	12, 16
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986)	9, 12
National Organization for Women, Inc. v. *Scheidler*, 114 S. Ct. 798 (1994)	13
North Star Steel Co. v. *Thomas*, 115 S. Ct. 1927 (1995)	18
Staples v. *United States*, 114 S. Ct. 1793 (1994)	12, 16
Theron v. *United States Marshal*, 832 F.2d 492 (9th Cir. 1987), cert. denied, 486 U.S. 1059 (1988)	20-21

Cases—Continued:

	Page
United States v. *Adler*, 623 F.2d 1287 (8th Cir. 1980)	7, 24
United States v. *Beer*, 518 F.2d 168 (5th Cir. 1975)	8
United States v. *Bonnette*, 663 F.2d 495 (4th Cir. 1981), cert. denied, 455 U.S. 951 (1982)	20
United States v. *Carter*, 526 F.2d 1276 (5th Cir. 1976)	24
United States v. *Cleary*, 565 F.2d 43 (2d Cir. 1977), cert. denied, 435 U.S. 915 (1978)	21
United States v. *Culbert*, 435 U.S. 371 (1978)	13
United States v. *Elkin*, 731 F.2d 1005 (2d Cir.), cert. denied, 469 U.S. 822 (1984)	24
United States v. *Gaudin*, 115 S. Ct. 2310 (1995)	6-7, 20, 23, 25
United States v. *Haddock*, 956 F.2d 1534 (10th Cir.), cert. denied, 506 U.S. 828 (1992)	21
United States v. *Irwin*, 654 F.2d 671 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982)	24
United States v. *Lopez*, 71 F.3d 954 (1st Cir. 1995), petitions for cert. pending, Nos. 95-1745 & 95-8569	20, 21-22
United States v. *Rapp*, 871 F.2d 957 (11th Cir.), cert. denied, 493 U.S. 890 (1989)	21
United States v. *Ribaste*, 905 F.2d 1140 (8th Cir. 1990)	6
United States v. *Ryan*, 828 F.2d 1010 (3d Cir. 1987)	20, 23
United States v. *Shabani*, 115 S. Ct. 382 (1994)	12, 15
United States v. *Snider*, 502 F.2d 645 (4th Cir. 1974)	24
United States v. *Spears*, 49 F.3d 1136 (6th Cir. 1995)	20

Cases—Continued:

	Page
United States v. *Staniforth*, 971 F.2d 1355 (7th Cir. 1992)	20, 22
United States v. *Taylor*, 66 F.3d 254 (9th Cir. 1995), petition for cert. pending, No. 95-8279	23-24
United States v. *Thompson*, 811 F.2d 841 (5th Cir. 1987)	20
United States v. *Thurnhuber*, 572 F.2d 1307 (9th Cir. 1977)	22
United States v. *Turkette*, 452 U.S. 576 (1981)	13
Williams v. *United States*, 458 U.S. 279 (1982)	15, 19

Constitution and statutes:

U.S. Const. Amend. VI	7
Hobbs Act, 18 U.S.C. 1951	13
Home Owners' Loan Act of 1933, ch. 64, § 8(a), 48 Stat. 134, 12 U.S.C. 1467(a) (1946)	10, 17, 18
7 U.S.C. 1026(a) (1946)	16
7 U.S.C. 1514(a) (1946)	16
8 U.S.C. 1101(f)(6)	19
10 U.S.C. 931	14
12 U.S.C. 596 (1946)	16
12 U.S.C. 981 (1946)	16
12 U.S.C. 1122 (1946)	16
12 U.S.C. 1123 (1946)	16
12 U.S.C. 1138d(a) (1946)	16
12 U.S.C. 1248 (1946)	16
12 U.S.C. 1312 (1946)	16
12 U.S.C. 1313 (1946)	16
12 U.S.C. 1441(a) (1946)	16
12 U.S.C. 1467(a) (1946)	16
15 U.S.C. 616(a) (1946)	16
15 U.S.C. 645	14
15 U.S.C. 645(a)	24
15 U.S.C. 714m	14
18 U.S.C. 287	7, 11, 23, 24, 25
18 U.S.C. 371	3, 4, 5, 12
18 U.S.C. 922(a)(6)	14

Statutes—Continued: Page

18 U.S.C. 1001 ..... 7, 11, 23, 24, 25
18 U.S.C. 1007 14
18 U.S.C. 1010 14
18 U.S.C. 1014 ..... *passim*
Reviser's Note (1952) 15, 19
18 U.S.C. 1015 14
18 U.S.C. 1026 14
18 U.S.C. 1033(a)(1) 14
18 U.S.C. 1158 14
18 U.S.C. 1621 14
18 U.S.C. 1623 14
18 U.S.C. 1919 14
18 U.S.C. 1962 12
19 U.S.C. 1919 14
19 U.S.C. 2316 14
21 U.S.C. 846 12
22 U.S.C. 618(a)(2) 14
22 U.S.C. 1980(g) 14
22 U.S.C. 2197(n) 14
29 U.S.C. 439(b) 14
30 U.S.C. 941 14
33 U.S.C. 931 14
42 U.S.C. 3220 14

Miscellaneous:

H.R. Rep. No. 1556, 91st Cong., 2d Sess. (1970) 19
H.R. Rep. No. 2060, 85th Cong., 2d Sess. (1958) 19
S. Rep. No. 1078, 88th Cong., 2d Sess. (1964) 19

In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 63 F.3d 745.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1995. A petition for rehearing was denied on November 2, 1995. Pet. App. 21a. The petition for a writ of certiorari was filed on January 31, 1996. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1014 of Title 18 provides:

> **Loan and credit applications generally; renewals and discounts; crop insurance.**
>
> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation or a company the Corporation reinsures, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers Home Administration, the Rural Development Administration, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as

> such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $1,000,000 or imprisoned not more that 30 years, or both.

STATEMENT

Following a jury trial, respondents were convicted in the United States District Court for the Western District of Missouri of conspiring to violate 18 U.S.C. 1014 by making false statements to federally insured banks for the purpose of influencing the decisions of those banks, in violation of 18 U.S.C. 371 (Count One), and of making false statements to the O'Bannon Bank, a federally insured bank, for the purpose of influencing the decisions of that bank, in violation of 18 U.S.C. 1014 (Count Two).[1] Each respondent was sentenced to a two-year term of probation. The court of appeals vacated respondents' convictions and remanded to the district court for retrial. Pet. App. 20a.

1. In 1986, respondents and Jim Russell jointly purchased a business that leased and serviced copier equipment, and they renamed that business Copytech

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[1] Following the close of the evidence, the district court entered judgments of acquittal on two other counts, each of which alleged that respondents had made false statements to another bank. Pet. App. 6a.

Systems, Inc. The business had serious financial troubles. When respondents and Russell purchased the business, they assumed responsibility for more than $8 million in debts, in addition to a serious cash flow problem. To obtain cash to cover the shortage, respondents arranged for Copytech to sell to financial institutions Copytech's right to future payments under customers' copier leases. The financial institutions paid for the future rights with a lump-sum of cash. Pet. App. 2a-3a.

Copytech's need for cash led to the crimes charged in the indictment. Beginning in 1987, in order to obtain financing, respondents and Russell conspired to misrepresent the terms of Copytech's agreements with its customers to federally insured financial institutions.[2] The false representations related in part to the terms of a particular lease-and-service agreement that Copytech had with customers known as the "Copier Management Program" (CMP). Under that program, Copytech leased copier equipment and provided service and supplies for that equipment in return for a monthly fee covering both the lease payments and the cost of servicing the copiers. Under its financing agreements with banks, Copytech would assign a bank its right to receive customers' monthly fees; in return, the bank would provide Copytech with financing. Copytech would retain the obligation to pay the cost of servicing its customers' copiers as those costs were incurred. Pet. App. 4a-5a.

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[2] Before respondents' trial, Russell pleaded guilty pursuant to a plea agreement to one count of conspiring with respondents to make false statements to federally insured banks in violation of 18 U.S.C. 371, and to three counts of making false statements. Pet. App. 3a n.1. Russell testified against respondents at trial. *Id.* at 17a.

Respondents' conspiracy principally involved falsely representing to banks that Copytech did not have any ongoing service obligations to customers. Those false representations were made because two banks had required that Copytech maintain a cash reserve bank account equal to 15% of the value of Copytech's lease contracts. The reserve was designed to cover Copytech's monthly service costs in the event that a customer defaulted on monthly payments and to protect the banks in the event that Copytech went out of business. To avoid the requirement of maintaining such a reserve account, Copytech altered its contracts with customers to state that the customer alone bore responsibility for service. Simultaneously, however, Copytech entered into separate contract addenda with the customers that shifted responsibility for servicing the leased copy equipment back to Copytech. Copytech then sent the revised leases to the banks from which it was seeking funding, but did not send the banks the service addenda. By withholding the service addenda, Copytech concealed its service and maintenance obligations from the banks, and thereby obtained funding without having to maintain cash reserves to cover service costs. Pet. App. 4a-6a.

Also to obtain financing for Copytech, respondents provided the O'Bannon Bank with unconditional personal loan guarantees purportedly signed by respondents' wives. In fact, respondents had forged the signatures of their wives. Count One of the indictment alleged a conspiracy to violate Section 1014 by making false statements to federally insured banks to influence their actions, in violation of 18 U.S.C. 371. The conspiracy charge was based on respondents' concealment of the hidden service costs of CMP

contracts in their dealings with the banks and on respondents' submission of the forged personal loan guarantees purportedly signed by their wives. Count Two alleged a substantive violation of Section 1014 based on the submission to O'Bannon Bank of the forged personal loan guarantees. Pet. App. 6a-7a, 18a.

2. The district court instructed the jury that the elements of the offense described by Section 1014 are (1) that the bank was federally insured; (2) that the defendant knowingly made or caused to be made a false statement to the bank as alleged in the indictment; and (3) that the defendant made that false statement "for the purpose of convincing the bank to purchase lease contracts." Pet. App. 22a. The court further instructed that "[a] statement is 'false' when it is untrue when made or effectively conceals a material fact." *Ibid.* The court then instructed that the "materiality of the statement or representation alleged to be false or concealed is not a matter with which you are concerned and should not be considered by you in determining the guilt or innocence of the defendant." *Id.* at 22a-23a. Following Eighth Circuit precedent, see *United States* v. *Ribaste*, 905 F.2d 1140, 1143 (1990), the court itself determined that the statements had been materially false. Pet. App. 8a & nn.3-4.[3]

3. The court of appeals vacated respondents' convictions and remanded for a new trial. Pet. App. 1a-20a. The court of appeals noted that, while the case was pending on appeal, this Court had held, in *United*

[3] Respondents had requested that the jury be instructed that materiality was an element of the offense, and objected to the district court's decision not to give that instruction. Pet. App 7a n.3.; see also J.A. 36-37.

States v. *Gaudin*, 115 S. Ct. 2310, 2320 (1995), that, when materiality is an element of an offense, the defendant's Sixth Amendment right to a jury trial mandates that the jury determine whether that element has been established. The court of appeals held that, in light of *Gaudin*, the district court had erred in not submitting the materiality of the false representations to the jury. Pet. App. 7a-9a & n.3.

The court of appeals rejected the argument that, because the term "material" does not appear in Section 1014's definition of the offense, materiality is not an element of that offense. The court of appeals noted that it had previously held that materiality is an element of the offenses described by 18 U.S.C. 1001 and 18 U.S.C. 287, although "neither statute lists materiality as an element of the crime." Pet. App. 11a (citing *United States* v. *Adler*, 623 F.2d 1287, 1291 n.5 (8th Cir. 1980)).[4] The court of appeals found "no

[4] Section 1001 (18 U.S.C.) provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

Section 287 (18 U.S.C.) provides:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to

reason to treat § 1014 any differently from the similarly worded §§ 287 and 1001." Pet. App. 12a. The court of appeals further observed that a majority of the courts of appeals have held that materiality is an element of Section 1014. *Ibid.* The court rejected the argument that those courts have inquired into materiality in reviewing convictions under Section 1014 in order "to exclude trifles from its coverage," not because materiality is "a statutorily required element of the crime." *Id.* at 13a. Rather, the court of appeals stated, the canon that, "[w]hen dealing with a pervasive, all-encompassing statute, * * * courts must be extremely careful to insure that reasonable limits are observed" justifies reading a materiality element into Section 1014. Pet. App. 13a (quoting *United States* v. *Beer*, 518 F.2d 168, 171 (5th Cir. 1975)).[5]

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be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

[5] The court of appeals rejected respondents' claim that the evidence at trial was insufficient to support the convictions. In finding the evidence sufficient to establish that the false statements that formed the principal basis of Count One were material, the court of appeals held that the fact that banks had required reserve accounts as a precondition to financing the CMP leases "is sufficient to support a finding that the withheld information was material, or in other words, had the capacity to influence the financial institutions." Pet. App. 18a. In finding the evidence sufficient to establish that the false statements that formed the basis of Count Two were material, the court of appeals held that "[t]he fact that O'Bannon Bank asked the defendants to have their wives sign unconditional loan guarantees supports a reasonable inference that personal loan guarantees from the defendants' spouses would have the capacity of influencing the bank." *Ibid.* Because the convictions were vacated, the court of appeals did not have occasion to address the sentencing issues that the government had raised in a cross-appeal. *Id.* at 19a.

SUMMARY OF ARGUMENT

A. As this Court has long held, the definition of the elements of a criminal offense is entrusted to the legislature, and "in determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986). Section 1014 of Title 18 provides that it is a crime when any person "knowingly makes any false statement or report * * * for the purpose of influencing in any way the action," *inter alia*, of a federally insured bank. The text of Section 1014 does not contain a materiality requirement. In light of Congress's provision of an express materiality requirement in many other false-statement statutes, Congress's intent to exclude materiality from the elements required to establish a violation of Section 1014 is clear.

The history of Section 1014 also demonstrates that Congress did not intend that materiality be an element of the offense. Section 1014 was enacted in 1948 as a consolidation of 13 previous false-statement and overvaluation statutes that had governed different financial or credit institutions. Of those statutes, three included an express materiality limitation, while the remaining ten statutes did not. The decision to pattern Section 1014 on the statutes that did not require a showing of materiality bespeaks Congress's intention that materiality would not be an element of the new statute. Moreover, in 1948 this Court had held, in *Kay* v. *United States*, 303 U.S. 1

(1938), that materiality was not an element of Section 8(a) of the Home Owners' Loan Act of 1933, ch. 64, 48 Stat. 134, 12 U.S.C. 1467(a) (1946), a predecessor statute to Section 1014. It is appropriate to presume that Congress was familiar with the holding in *Kay*. In closely patterning Section 1014 on Section 8(a), Congress manifested its understanding that the new statute would be construed similarly, *i.e.*, not to contain a materiality element.

Finally, imputing a materiality element to Section 1014 is inconsistent with the decision in *Kungys* v. *United States*, 485 U.S. 759 (1988). In *Kungys*, the Court held that materiality was not an element of an immigration statute that, like Section 1014, prohibited the making of a false statement for designated purposes. The Court in *Kungys* noted that the text of the statute at issue did not differentiate between material and immaterial false statements, and it held that the statute "means precisely what it says." *Id.* at 780. The logic of *Kungys* is equally applicable to Section 1014.

B. The court of appeals believed that a materiality requirement is necessary in order generally to exclude from prosecution trivial false statements incapable of influencing a bank. That purpose, however, is already served by Section 1014's distinctive intent requirement, which requires prosecutors to establish not only that the defendant knowingly made a false statement, but that he did so "for the purpose of influencing in any way the actions" of a covered financial institution. As numerous courts have recognized, a defendant's intent to influence a bank's actions will usually be established as an inference from the actual materiality of the false statement itself. In any event, Congress is entitled to prohibit

persons from knowingly making a false statement to a bank for the purpose of influencing the bank, without requiring proof of the actual materiality of that statement.

The court of appeals also drew an analogy to 18 U.S.C. 287 and 18 U.S.C. 1001, both of which, in the court's view, are subject to a materiality limitation. It is open to question whether materiality is an element of every offense under those two statutes. In any event, Section 287 and Section 1001 are both worded differently from Section 1014, and the interpretation of those statutes therefore does not bear on the interpretation of Section 1014.

ARGUMENT

THE MATERIALITY OF THE FALSE STATEMENT OR REPORT IS NOT AN ELEMENT OF THE OFFENSE DEFINED BY 18 U.S.C. 1014

Section 1014 of Title 18 imposes criminal penalties on any person who "knowingly makes any false statement or report * * * for the purpose of influencing in any way the action," *inter alia*, of a federally insured bank. The text of Section 1014 does not include a materiality requirement. The court of appeals' decision to read such a requirement into the statute conflicts with the fundamental principle that the task of defining the elements of a criminal offense is entrusted exclusively to Congress. It is also inconsistent with the history of Section 1014, and with this Court's construction of a predecessor statute in *Kay* v. *United States*, 303 U.S. 1 (1938). Finally, even if policy considerations were relevant to this issue, there is no persuasive policy justification for grafting such a requirement onto the statute.

A. Imputing A Materiality Requirement To Section 1014 Is Inconsistent With The Text And History Of The Statute And With This Court's Decision In *Kay* v. *United States*

1. This Court has long made clear that "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 114 S. Ct. 1793, 1796 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)). Thus, "in determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986).

Applying those principles, the Court has consistently held that courts may not alter the legislative definition of a criminal offense by adding elements that have no basis in the statutory text. Most recently, in *United States* v. *Shabani*, 115 S. Ct. 382 (1994), the Court unanimously rejected the argument that courts should impute to the drug conspiracy statute, 21 U.S.C. 846, a requirement that a conspirator have committed an overt act in furtherance of the conspiracy. The Court noted that, unlike the general conspiracy statute, 18 U.S.C. 371, the text of Section 846 does not contain an overt act requirement. The Court accordingly held that, "[i]n light of this additional element in the general conspiracy statute, Congress' silence in § 846 speaks volumes." 115 S. Ct. at 385. Relying on precedents construing the general conspiracy statute to contain an overt act element was error, the Court held, in light of "the textual variations between the two provisions." *Ibid.*

Similarly, in *National Organization for Women, Inc.* v. *Scheidler*, 114 S. Ct. 798 (1994), the Court rejected the argument that, for a defendant to be convicted of violating the federal racketeering statute, 18 U.S.C. 1962, it must be shown that the racketeering enterprise "be accompanied by an underlying economic motive." 114 S. Ct. at 803. While the racketeering statute broadly defines the term "enterprise," the Court noted, "nowhere in [the statute] is there any indication that an economic motive is required." *Id.* at 804; see also *id.* at 805; *United States* v. *Turkette*, 452 U.S. 576, 581 (1981) (rejecting claim that, to establish violation of racketeering statute, it must be shown that the enterprise was "legitimate," and noting that, "[h]ad Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, 'legitimate'"); *United States* v. *Culbert*, 435 U.S. 371, 373 (1978) (rejecting claim that, to establish violation of the Hobbs Act, 18 U.S.C. 1951, it must be shown that defendant engaged in "racketeering" activities, and noting that "the absence [in the statute] of any reference to 'racketeering'—much less any definition of the word—is strong evidence that Congress did not intend to make 'racketeering' an element of a Hobbs Act violation").

2. The principle that Congress's definition of the elements of a criminal offense is controlling compels the conclusion that, to prove a violation of Section 1014, it is not necessary to establish that the false statement or report made to a financial institution was material to that institution's decision. Section 1014 is one of a number of statutes that punish the making of false statements in different contexts. Some of those statutes contain a textual

materiality requirement. See, *e.g.*, 18 U.S.C. 922(a)(6) (false statement on firearms application); 18 U.S.C. 1033(a)(1) (false statement on insurance document); 18 U.S.C. 1621 (perjury); 18 U.S.C. 1623 (false declarations before grand jury or court); 18 U.S.C. 1919 (false statement to obtain unemployment compensation for federal service); see also 10 U.S.C. 931 (perjury in proceedings governed by Uniform Code of Military Justice); 19 U.S.C. 1919 (false statement for purpose of influencing action of Secretary of Commerce); 19 U.S.C. 2316 (false statement for purpose of increasing certain government payments); 22 U.S.C. 618(a)(2) (false statement in a foreign-agent registration statement); 29 U.S.C. 439(b) (false statement in reports to Secretary of Labor). Other statutes, however, including Section 1014, do not.[6]

In light of Congress's express inclusion of a materiality requirement in other false-statement statutes, the absence of the term "material" from Section 1014

[6] See, *e.g.*, 15 U.S.C. 645 (false statements for purpose of influencing the Small Business Administration); 15 U.S.C. 714m (Commodity Credit Corporation); 18 U.S.C. 1007 (Federal Deposit Insurance Corporation); 18 U.S.C. 1010 (Department of Housing and Urban Development and Federal Housing Administration); 18 U.S.C. 1015 (relating to naturalization, citizenship, or alien registry); 18 U.S.C. 1026 (certain Department of Agriculture programs); 18 U.S.C. 1158 (Indian crafts); 22 U.S.C. 1980(g) (compensation for commercial fishing vessels); 22 U.S.C. 2197(n) (Overseas Private Investment Corporation); 30 U.S.C. 941 (black lung benefits); 33 U.S.C. 931 (longshore and harbor workers' compensation); 42 U.S.C. 3220 (certain economic development funds administered by the Secretary of the Treasury).

"speaks volumes." *Shabani*, 115 S. Ct. at 385. The text of Section 1014 instead makes clear that:

> To obtain a conviction under [Section] 1014, the Government must establish two propositions: it must demonstrate (1) that the defendant made a "false statement or report," or "willfully overvalue[d] any land, property or security," and (2) that he did so "for the purpose of influencing in any way the action of [a described financial institution] upon any application, advance, . . . commitment, or loan."

Williams v. *United States*, 458 U.S. 279, 284 (1982). It is not necessary also to establish that the false statement or report was material to the financial institution's action. See *ibid.* (listing elements of a Section 1014 violation, without mentioning materiality).[7]

3. The history of Section 1014 further demonstrates that Congress did not intend materiality to be an element of the offense it described. Section 1014 was enacted in 1948. It represented a codification, in a single section of Title 18, of 13 separate false-statement and overvaluation statutes that previously had governed false statements to different financial or credit institutions. *Williams*, 458 U.S. at 288; see 18 U.S.C. 1014, Reviser's Note (1952). Of those 13 statutes, ten did not include a textual materiality

[7] Although the question whether materiality is an element of Section 1014 was not presented in *Williams*, the Court's recitation of the elements of Section 1014 without reference to materiality may be significant in that, as the Court noted, the district court in *Williams* had instructed the jury that materiality was an element of the offense. See 458 U.S. at 283.

requirement, while three others did.[8] Congress's decision to pattern Section 1014, the consolidated statute, on those predecessor statutes that did not contain a textual materiality requirement, rather than on the predecessor statutes that did, is consistent only with an understanding that materiality would not be an element of the new statute.[9]

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[8] The three predecessor statutes that included a textual materiality requirement were 7 U.S.C. 1026(a) (1946), 12 U.S.C. 596 (1946), and 12 U.S.C. 1138d(a) (1946). Of the ten predecessor statutes containing no reference to materiality, seven, like Section 1014, required that the false statement be "for the purpose of influencing" the action of the specified institution or "for the purpose of obtaining" certain benefits. See 7 U.S.C. 1514(a) (1946); 12 U.S.C. 1122, 1248, 1312, 1441(a), 1467(a) (1946); and 15 U.S.C. 616(a) (1946). The remaining three statutes proscribed the making of a false statement without requiring either that the statement be material or that it be made for a particular purpose. See 12 U.S.C. 981, 1123, 1313 (1946).

[9] The diversity among those predecessor statutes also reveals that there is no background principle that would justify reading a materiality requirement into Section 1014. As the predecessors to that provision show, Congress has long recognized that, in particular contexts, knowing false statements warrant criminal punishment without regard to whether those statements are shown to be material. This case thus presents a question distinct from the issue whether an intent element should be imputed to a statute whose text does not refer to the defendant's *mens rea*. The Court has taken "particular care * * * to avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.'" *Staples*, 114 S. Ct. at 1799 (quoting *Liparota*, 471 U.S. at 426). A defendant who has willfully made a false statement "for the purpose" of influencing the action of a bank, however, has not engaged in "apparently innocent conduct." *Staples*, 114 S. Ct. at 1799.

Moreover, ten years before the enactment of Section 1014, this Court had construed a similarly worded predecessor statute to Section 1014 in *Kay* v. *United States*, *supra*. At issue in *Kay* was Section 8(a) of the Home Owners' Loan Act of 1933, ch. 64, 48 Stat. 134, 12 U.S.C. 1467(a) (1946). Section 8(a) made it a crime to make

> any statement, knowing it to be false, or [to] willfully overvalue[] any security, for the purpose of influencing in any way the action of the Home Owners' Loan Corporation or the Board or an association upon any application, advance, discount, purchase, or repurchase agreement, or loan, under this Act * * *.

Kay, 303 U.S. at 3 & n.1. Kay was the second mortgagee of a property on which a loan had been sought from the Home Owners' Loan Corporation. She had overstated the amount of her claim against the property in a consent form to accept bonds of the Corporation in full settlement of her debt. *Id.* at 5. On appeal, she challenged her conviction on the ground that her false statements had been immaterial, because "any statement in the consent of a second mortgagee as to the balance due cannot endanger or directly influence any loan made by the Corporation." *Ibid.*

This Court unanimously rejected Kay's claim. It held that the materiality of the false statement was not an element of the offense described by Section 8(a):

> It does not lie with one knowingly making false statements with intent to mislead the officials of the Corporation to say that the statements were not influential or the information not important.

> There can be no question that Congress was entitled to require that the information be given in good faith and not falsely with intent to mislead. Whether or not the Corporation would act favorably on the loan is not a matter which concerns one seeking to deceive by false information. The case is not one of an action for damages but of criminal liability and actual damage is not an ingredient of the offense.

303 U.S. at 5-6.

Section 1014 parallels Section 8(a) in all relevant respects. Both statutes criminalize the willful making of a false statement to a covered financial institution, provided that the defendant has made the false statement "for the purpose of influencing in any way the action" of that institution. Neither statute includes the term "material." A holding that materiality is an element of Section 1014 therefore cannot be squared with *Kay*, or with the absence from Section 1014 of any materiality requirement. Moreover, the statute involved in *Kay* was one of the predecessors to Section 1014, see note 8, *supra*, and it is appropriate to presume that Congress was familiar with that holding. See *North Star Steel Co.* v. *Thomas*, 115 S. Ct. 1927, 1930 (1995). It is thus untenable to assume that Congress in 1948, despite this Court's construction in *Kay* of the language in Section 8(a), expected *sub silentio* that the parallel language of Section 1014 would receive a diametrically opposite interpretation. On the contrary, the Reviser's Note to Section 1014 states that, with exceptions not relevant here, the 1948 consolidation of the 13 false-statement statutes was not intended to

effect any "change of substance." See 18 U.S.C. 1014, Reviser's Note (1952).[10]

4. Finally, imputing a materiality requirement to Section 1014 is inconsistent with this Court's analysis in *Kungys* v. *United States*, 485 U.S. 759 (1988). In that case, the Court examined the requirements of a false-statement statute that, like Section 1014, does not use the term "material." The statute in *Kungys*, 8 U.S.C. 1101(f)(6), provided that a person shall be deemed not of good moral character for certain purposes under the immigration laws, and hence not entitled to be naturalized, if he has given "false testimony for the purpose of obtaining" immigration or naturalization benefits. The Court held that Section 1101(f)(6) does not require that the false testimony be material. 485 U.S. at 779. The Court

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[10] Nor have the subsequent amendments to Section 1014 altered the type of conduct which Section 1014 proscribes. Rather, each amendment has merely expanded the list of financial institutions to which the statute applies, see *Williams*, 458 U.S. at 288; the congressional reports on the amendments tracked the language of the statute and did not use the term "materiality." See H.R. Rep. No. 2060, 85th Cong., 2d Sess. 19 (1958) (amendment adding small-business investment companies made it a crime "for any person knowingly to make any false statement or report or willfully to overvalue any property or security for the purpose of influencing the action of a small-business investment company"); S. Rep. No. 1078, 88th Cong., 2d Sess. 2 (1964) (amendment adding federal credit unions made it a crime "for anyone knowingly to make a false statement or report or willfully overvalue any land, property, or security to influence the action of a federal credit union in connection with any application, loan, or the like"); H.R. Rep. No. 1556, 91st Cong., 2d Sess. 70-71 (1970) (amendment adding federally insured elements describing the offense as proscribing "false statements or reports in connection with loans or other similar transactions").

explained its refusal to read such an element into the statute as follows:

> On its face, § 1101(f)(6) does not distinguish between material and immaterial representations. Literally read, it denominates a person to be of bad moral character on account of having given false testimony if he has told even the most immaterial of lies with the subjective intent of obtaining immigration benefits. We think it means precisely what it says.

Id. at 779-780. The analysis in *Kungys* is equally applicable to Section 1014.

B. There Is No Basis For Imputing A Materiality Element To Section 1014

1. Notwithstanding the lack of a textual requirement of materiality, the majority of the courts of appeals, including the Eighth Circuit in this case, treat materiality as an element of Section 1014, thereby requiring the government to establish that the statement had "a natural tendency to influence, or [be] capable of influencing, the decision of the [institution] to which it was addressed." *United States* v. *Gaudin*, 115 S. Ct. 2310, 2313 (1995) (quoting *Kungys*, 485 U.S. at 770).[11] To the extent that those

[11] See, *e.g.*, *United States* v. *Lopez*, 71 F.3d 954, 960 (1st Cir. 1995), petitions for cert. pending, Nos. 95-1745 (filed Apr. 26, 1996) & 95-8569 (filed Mar. 29, 1996); *United States* v. *Ryan*, 828 F.2d 1010, 1013 n.1 (3d Cir. 1987); *United States* v. *Bonnette*, 663 F.2d 495, 497 (4th Cir. 1981), cert. denied, 455 U.S. 951 (1982); *United States* v. *Thompson*, 811 F.2d 841, 844 (5th Cir. 1987); *United States* v. *Spears*, 49 F.3d 1136, 1141 (6th Cir. 1995); *United States* v. *Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992); *Theron* v. *United States Marshal*, 832 F.2d 492, 496-497 (9th Cir. 1987), cert. denied, 486 U.S. 1059 (1988); *United States* v. *Haddock*, 956 F.2d 1534, 1549 (10th Cir.), cert. denied, 506 U.S. 828 (1992); *United States* v. *Rapp*, 871 F.2d 957, 963-964 (11th Cir.), cert. denied, 493 U.S. 890 (1989); but see *United States* v. *Cleary*, 565 F.2d 43, 46 (2d Cir. 1977) (holding, based on *Kay*, that materiality is not an element of Section 1014), cert. denied, 435 U.S. 915 (1978).

courts have explained the addition of a materiality element, they have generally stated that it is necessary to exclude from prosecution under Section 1014 trivial false statements incapable of influencing a bank. See, *e.g.*, *United States* v. *Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992); Pet. App. 13a (addition of materiality element ensures "that reasonable limits are observed"). For two reasons, that argument is unsound.

First, a similar purpose is already served by Section 1014's distinctive intent requirement, which requires prosecutors to establish not only that the defendant knowingly made a false statement, but that the defendant made the false statement "for the purpose of influencing in any way the actions" of a covered financial institution. 18 U.S.C. 1014. That requirement narrows the scope of Section 1014 to statements that the defendant subjectively believes would prompt the bank to act, an intent that would rarely exist (or be capable of being proved) when the statement made or fact concealed was trivial in character. Thus, a person who makes an immaterial false statement solely for a purpose other than to influence the bank (*e.g.*, to keep a private matter confidential) does not violate the statute. See *United States* v. *Lopez*, 71 F.3d 954, 961 (1st Cir. 1995) (proof of the requisite "purpose of influencing" will usually require an inference from proof of actual materiality), petitions for cert. pending, Nos. 95-1745 (filed Apr. 26,

1996) & 95-8569 (filed Mar. 29, 1996); *United States* v. *Thurnhuber*, 572 F.2d 1307, 1309 n.1 (9th Cir. 1977) ("An individual is not likely to provide immaterial and unimportant information in the hope of influencing a bank's action"); see also *Staniforth*, 971 F.2d at 1357-1358 ("the less material the statement was, the less likely it was to have been made for the purpose of influencing the bank"). There is no reason to conclude that Congress intended an additional, implicit materiality requirement to serve the same purpose of limiting the coverage of the statute. As this Court noted in *Kungys*, in holding that is unnecessary to read a materiality limitation into a statute prohibiting the making of a false statement for the purpose of obtaining certain immigration benefits:

> Obviously, it will be relatively rare that the Government will be able to prove that a misrepresentation that does not have the natural tendency to influence the decision regarding immigration or naturalization benefits was nonetheless made with the subjective intent of obtaining those benefits. This is especially so since the invalidating intent * * * must be proved by "clear, unequivocal, and convincing" evidence which does not leave "the issue in doubt."

485 U.S. at 780-781 (citation omitted). That analysis has even greater force as applied under Section 1014, because the intent element under that provision must be established beyond a reasonable doubt.

Second, there are sound reasons for Congress to make it an offense where a false statement was made for the purpose of influencing a bank, even though materiality cannot be established. A statute that penalizes all false statements made for the purpose of

influencing banks, without regard to the materiality of those statements, may have the salutary effect of deterring the making of false statements to banks generally. It may also reflect a judgment that the willful making of a false statement for the purpose of influencing a bank is a form of "morally unacceptable" conduct that warrants punishment, regardless of whether that conduct has the capacity for visiting actual harm upon a bank. See *Kungys*, 485 U.S. at 780. To deviate from the "natural meaning" of Section 1014 by imposing an additional materiality requirement, *id.* at 781, would therefore decriminalize a category of potential wrongdoing that Congress was entitled to deter and punish through a criminal sanction. See *Kay*, 303 U.S. at 5-6 ("There can be no question that Congress was entitled to require that the information be given in good faith and not falsely with intent to mislead").

2. The court of appeals in this case also subjected Section 1014 to a materiality limitation because both 18 U.S.C. 1001 and 18 U.S.C. 287 have been held by some lower courts to contain a materiality element, and because it saw no "reason to treat [Section 1014] any differently." Pet. App. 12a; see *United States* v. *Ryan*, 828 F.2d 1010, 1013 n.1 (3d Cir. 1987) (also basing interpretation of Section 1014 on precedent construing Section 1001). Reliance on those holdings was error. First, it is open to question whether the courts that have held materiality to be an element of Section 1001 and Section 287 have been correct in so holding. See *Gaudin*, 115 S. Ct. at 2320 (Rehnquist, C.J., concurring) (addressing Section 1001).[12] The

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[12] Compare *United States* v. *Taylor*, 66 F.3d 254, 255 (9th Cir. 1995) (materiality is not an element of Section 287),

text of Section 287, like that of Section 1014, does not contain a materiality limitation. And, of the three clauses of Section 1001, only the first contains the term "material." See note 4, *infra*.

In any event, both Section 287 and Section 1001 are worded differently from Section 1014, and the interpretation of those statutes therefore does not control the interpretation of Section 1014. Neither statute contains the distinctive intent requirement of Section 1014, which, as we have discussed, largely serves the purpose of a materiality requirement in limiting the scope of conduct rendered criminal under

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petition for cert. pending, No. 95-8279 (filed Mar. 15, 1996); *United States* v. *Elkin*, 731 F.2d 1005, 1009-1010 (2d Cir.) (the "language of § 287 in no way suggests that materiality is an element of the offense"), cert. denied, 469 U.S. 822 (1984); *United States* v. *Irwin*, 654 F.2d 671, 682 (10th Cir. 1981) (materiality is not an element of Section 287), cert. denied, 455 U.S. 1016 (1982), with *United States* v. *Snider*, 502 F.2d 645 (4th Cir. 1974) (stating in dicta that materiality is an element of Section 287). In stating that materiality is an element of Section 287, the Eighth Circuit below relied on its opinion in *United States* v. *Adler*, 623 F.2d 1287, 1291 n.5 (1980). In that case, however, the parties did not address that question specifically, and the court stated that, for the purposes of deciding the case, it would "treat materiality as an essential element." *Ibid.* Because the court of appeals in *Adler* found that the statements and claims were in fact material, it was not necessary in that case to decide the question whether materiality is an element of Section 287 or Section 1001. *Id.* at 1291-1292. See also *United States* v. *Carter*, 526 F.2d 1276, 1278 (5th Cir. 1976) (where statute, 15 U.S.C. 645(a), does not include term "material" but instead proscribes making of a false statement for purpose of influencing Small Business Administration, government is not required "to show that the particular statement would have, in fact, affected the action of the S.B.A.").

the statute. Moreover, because the first clause of Section 1001 contains the term "material," there is a textual basis for concluding that all prosecutions under that statute are subject to a materiality limitation. And, with regard to Section 287, that statute does not apply at all to false statements, but, instead, to "false, fictitious, or fraudulent" "claims upon or against the United States." See 18 U.S.C. 287.

3. Finally, the addition of a materiality element to Section 1014 would unnecessarily burden prosecutions under that statute. Under this Court's decision in *Gaudin*, when materiality is an element of an offense, it must be decided by the jury. Conditioning a conviction on the jury's having found the existence of an element extraneous to the text of a statute heightens the chances that, solely as a result of speculation or confusion regarding that extra element, a jury will not return a verdict of guilty that it otherwise regards as warranted.

The addition of a materiality element in cases brought under Section 1014 poses a particular risk of such speculation or confusion, because jurors will often have had personal experiences with financial and credit institutions. Despite a legal standard that focuses inquiry on whether the false statement had "a natural tendency to influence" a decision of the financial institution, *Gaudin*, 115 S. Ct. at 2313, jurors may be inclined improperly to inquire, based on their own experiences, whether the bank's action on the particular loan application or other submission at issue would in fact have been any different absent the falsehood. While it is appropriate to require the government to establish materiality when a defendant is charged with an offense that makes materiality an

element, it is unnecessary, distracting, and burdensome to require trial on that issue when Congress has not made materiality an element of the offense.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

PAUL A. ENGELMAYER
Assistant to the Solicitor General

WILLIAM C. BROWN
Attorney

JUNE 1996

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QUESTIONS PRESENTED

I. WHETHER THE GOVERNMENT IS PRECLUDED FROM RAISING THE ISSUE THAT MATERIALITY IS NOT AN ELEMENT OF 18 U.S.C. § 1014 WHERE THE GRAND JURY INDICTMENT CHARGED MATERIALITY AS AN ELEMENT OF THE OFFENSES, THE JURY INSTRUCTIONS REQUESTED BY THE GOVERNMENT AND SUBMITTED TO THE JURY INCLUDED MATERIALITY AS AN ELEMENT OF THE OFFENSES, AND WHERE THE GOVERNMENT DID NOT OBJECT OR OTHERWISE ARGUE TO THE DISTRICT COURT THAT MATERIALITY IS NOT A REQUISITE ELEMENT OF SECTION 1014 WHEN THE DISTRICT COURT MADE ITS RULINGS REGARDING MATERIALITY.

II. WHETHER THE COURT OF APPEALS CORRECTLY RECOGNIZED THAT MATERIALITY IS AN ESSENTIAL ELEMENT OF 18 U.S.C. § 1014 AND IS A QUESTION FOR THE JURY TO DETERMINE.

III. IF THIS COURT DETERMINES THAT MATERIALITY IS NOT AN ELEMENT OF 18 U.S.C. § 1014, WHETHER THE CASE MUST STILL BE REMANDED FOR A NEW TRIAL BECAUSE THE JUDGE'S DETERMINATION OF MATERIALITY AND INSTRUCTION TO THE JURY TO DISREGARD MATERIALITY ESSENTIALLY TOOK AWAY FROM THE JURY'S DETERMINATION THE ELEMENTS OF "PURPOSE OF INFLUENCING" AND WHETHER THE STATEMENT WAS "FALSE."

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 2

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 8

I. THE GOVERNMENT IS PRECLUDED FROM RAISING THE ISSUE THAT MATERIALITY IS NOT AN ELEMENT OF 18 U.S.C. § 1014 WHERE THE GRAND JURY INDICTMENT CHARGED MATERIALITY AS AN ELEMENT OF THE OFFENSES, THE JURY INSTRUCTIONS REQUESTED BY THE GOVERNMENT AND SUBMITTED TO THE JURY INCLUDED MATERIALITY AS AN ELEMENT OF THE OFFENSES, AND WHERE THE GOVERNMENT DID NOT OBJECT OR OTHERWISE ARGUE TO THE DISTRICT COURT THAT MATERIALITY IS NOT A REQUISITE ELEMENT OF SECTION 1014 WHEN THE DISTRICT COURT MADE ITS RULINGS REGARDING MATERIALITY. 11

A. The Grand Jury Indictment Charged Materiality 12

B. The Government's Jury Instructions Included Materiality 15

C. Failure to Object 17

II. THE COURT OF APPEALS CORRECTLY RECOGNIZED THAT MATERIALITY IS AN ESSENTIAL ELEMENT OF 18 U.S.C. § 1014 AND IS A QUESTION FOR THE JURY TO DETERMINE. 20

A. Nearly Every Federal Circuit has Found Materiality to be a Requisite Element of 18 U.S.C. § 1014 22

B. The Actual Text of the Statute Does not Indicate that Materiality Cannot be an Element of a Section 1014 Offense 24

C. The Legislative History of Section 1014 Does not Indicate an Intent by Congress to Dispense With the Materiality Element 26

D. The Application of the Rule of Lenity 30

E. When Congressional Drafting Errors Occur, Courts are not Bound to Read Statute Literally 31

F. The Government's Reliance on *Kay, Williams*, and *Kungys* is Misplaced 32

G. There are Good Reasons to Require Materiality in Section 1014 Prosecutions 35

III. IF THIS COURT DETERMINES THAT MATERIALITY IS NOT AN ELEMENT OF 18 U.S.C. § 1014, THEN THE CASE MUST STILL BE REMANDED FOR A NEW TRIAL BECAUSE THE JUDGE'S DETERMINATION OF MATERIALITY AND INSTRUCTION TO THE JURY TO DISREGARD MATERIALITY ESSENTIALLY TOOK AWAY FROM THE JURY'S DETERMINATION THE ELEMENTS OF "PURPOSE OF INFLUENCING" AND WHETHER THE STATEMENT WAS "FALSE." 37

CONCLUSION 39

TABLE OF AUTHORITIES

Page(s)

Cases:

Boys Market, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235 (1970) 27, 28

Daughtry v. United States, 116 S. Ct. 510 (1995) 21

Fedorenko v. United States, 449 U.S. 490 (1981) 34

Gatewood v. United States, 116 S. Ct. 510 (1995) 21

Girouard v. United States, 328 U.S. 61 (1946) 27, 28

Helvering v. Hallock, 309 U.S. 106 (1940) 28

Johnson v. Transportation Agency, Santa Clara County, California, 480 U.S. 616 (1987) (*Scalia, J., dissenting*) 28, 27

Kay v. United States, 303 U.S. 1 (1938) 32, 33

Knapp v. United States, 116 S. Ct. 666 (1995) 21

Kungys v. United States, 485 U.S. 759 (1988) 34, 35

Liparota v. United States,
471 U.S. 419 (1985) 26, 31, 35

Morisette v. United States,
342 U.S. 246 (1952) 26

Pembaur v. City of Cincinnati,
882 F.2d 1101 (6th Cir. 1989) 18

Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel,
490 F.2d 509 (2d Cir. 1973) 26

Porat v. United States,
115 S. Ct. 2604 (1995) 21

Sinclair Refining Co. v. Atkinson,
370 U.S. 195 (1962) 28

Smith v. United States,
360 U.S. 1 (1959) 35

Staples v. United States,
114 S. Ct. 1793 (1985) 26, 30, 31, 35

Steagald v. United States,
451 U.S. 204 (1981) 18

Stirone v. United States,
361 U.S. 212 (1960) 13

United States v. Abod,
770 F.2d 1293 (5th Cir. 1985) 16, 17

United States v. Adler,
623 F.2d 1287 (8th Cir. 1980 ..... 7, 21, 22

United States v. Beer,
518 F.2d 168 (5th Cir. 1975) 22, 35

United States v. Camp,
541 F.2d 737 (8th Cir. 1976) 13

United States v. Carr,
965 F.2d 408 (7th Cir. 1992) 18

United States v. Cleary,
565 F.2d 43 (2d Cir. 1977),
cert. denied, 435 U.S. 915 (1978) 23

United States v. Concemi,
957 F.2d 942 (1st Cir. 1992) 15

United States v. Falvey,
676 F.2d 871 (1st Cir. 1982) 31, 32

United States v. Fields,
875 F.2d 130 (7th Cir. 1989) 13

United States v. Gaudin,
115 S. Ct. 2310 (1995) ..... passim

United States v. Goberman,
458 F.2d 226 (3rd Cir. 1972) 33

United States v. Haddock,
956 F.2d 1534 (10th Cir. 1992),
cert. denied, 506 U.S. 828 (1992) 22, 25

United States v. Jacoby,
955 F.2d 1527 (11th Cir. 1992),
cert. denied, 507 U.S. 920 (1993) 15

United States v. Johnson,
26 F.3d 669 (7th Cir. 1994),
cert. denied, 115 S. Ct. 344 (1995) 19

United States v. Johnson,
495 F.2d 242 (10th Cir. 1974) 16

United States v. Johnson,
585 F.2d 119 (5th Cir. 1978) 33

United States v. Jokel,
969 F.2d 132 (5th Cir. 1992) 16

United States v. Killip,
819 F.2d 1542 (10th Cir. 1987),
cert. denied, 484 U.S. 865 (1987) 16

United States v. Lopez,
71 F.3d 954 (1st Cir. 1995) 15, 22, 37

United States v. Mangieri,
694 F.2d 1270 (D.C. Cir. 1982) 22

United States v. Miller,
471 U.S. 130 (1985) 13-14

United States v. Morales,
737 F.2d 761 (8th Cir. 1984) 18

United States v. Nabors,
762 F.2d 642 (8th Cir. 1985) 13

United States v. Nash,
76 F.3d 282 (9th Cir. 1996) 22

United States v. Norberg,
612 F.2d 1 (1st Cir. 1979) 14

United States v. Ribaste,
905 F.2d 1140 (8th Cir. 1990) 22

United States v. Rumely,
345 U.S. 41 (1953) 30

United States v. Ryan,
828 F.2d 1010 (3rd Cir. 1987) 22, 25, 34

United States v. Sabatino,
485 F.2d 540 (2d Cir. 1973),
cert. denied, 415 U.S. 948 (1974) 23

United States v. Schmurstein,
977 F.2d 449 (8th Cir. 1992) 18

United States v. Scott,
701 F.2d 1340 (11th Cir. 1983),
cert. denied, 464 U.S. 856 (1983) 22

United States v. Shabani,
115 S. Ct. 382 (1994) 28, 39, 31

United States v. Sharpe,
996 F.2d 125 (6th Cir. 1993),
cert. denied, 114 S. Ct. 400 (1993) 18

United States v. Spears,
49 F.3d 1136 (6th Cir. 1993) 22

United States v. Spletzer,
535 F.2d 950 (5th Cir. 1976) 16

United States v. Staniforth,
971 F.2d 1355 (7th Cir. 1992) 13, 36

United States v. Stephens,
779 F.2d 232 (5th Cir. 1985) 33

United States v. Tapio,
634 F.2d 1092 (8th Cir. 1980) 16

United States v. Thompson,
811 F.2d 841 (5th Cir. 1987) 18, 22

United States v. Trixler,
474 F.2d 369 (5th Cir. 1973),
cert. denied, 412 U.S. 929 (1973) 25

United States v. Ward,
914 F.2d 1340 (9th Cir. 1990) 18

United States v. Wells,
63 F.3d 745 (8th Cir. 1995) 20, 25

United States v. Whaley,
786 F.2d 1229 (4th Cir. 1986) 22

United States v. Williams,
12 F.3d 452 (5th Cir. 1994) 24, 35

United States v. Wiltberger,
18 U.S. (5 Wheat) 76 (1820) 36

United States v. Woodring,
464 F.2d 1248 (10th Cir. 1972) 16

United States v. X-Citement Video, Inc.,
115 S. Ct. 464 (1994) 26

United Steelworkers of Am. v. Weber,
443 U.S. 193 (1987) 28

Waldron v. United States,
116 S. Ct. 333 (1995) 21

Williams v. New York,
337 U.S. 241 (1949) 35

Williams v. United States,
458 U.S. 279 (1982) 33, 34

Statutes:

8 U.S.C. § 1101(f)(6) 34

12 U.S.C. § 1467(a) (1933) 32

18 U.S.C. § 1001 ..... passim

18 U.S.C. § 1623 21

18 U.S.C. § 287 22

18 U.S.C. § 3553(e) 5

18 U.S.C. § 371 ..... 2, 28

18 U.S.C. § 751 16

21 U.S.C. § 846 28

18 U.S.C. § 1014 . . . . . passim

28 U.S.C. § 1332 26

U.S.S.G. § 5K1.1 4

Other:

American Law Institute, THE MODEL PENAL CODE (1980) 24

Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION, § 59.03 at 102 (5th ed. 1992) 31, 36

Richard A. Posner, *Statutory Interpretation: In the Classroom and Courtroom*, 50 U. CHI. L. REV. 800 (1983) 26

Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 849 (1992) 32

No. 95-1228

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

JERRY E. WELLS
and
KENNETH R. STEELE,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINION BELOW

The Respondents accept the Petitioner's statement of the Opinion Below as set forth in the Brief for the United States.

JURISDICTION

The Respondents accept the Petitioner's statement of Jurisdiction as set forth in the Brief for the United States.

STATUTORY PROVISION INVOLVED

The Respondents accept the Petitioner's statement of the statutory provision involved as set forth in the Brief for the United States.

STATEMENT OF THE CASE

The Respondents were each charged by Indictment in the United States District Court for the Western District of Missouri with one count of conspiracy to make material false statements to a financial institution in violation of 18 U.S.C. § 371, and four counts of making material false statements to financial institutions, in violation of 18 U.S.C. § 1014. *See* Pet. App. 2a; J.A. 18-34. The Respondents entered pleas of not guilty to all charges. Before trial, one false statement count was dismissed by the district court for failure to state an offense. Following the close of all the evidence, the district court also granted judgments of acquittal on two other false statement counts. Thus, the conspiracy to submit material false statements count and the substantive false statement count were submitted to the jury. Pet. App. 6a.

After its deliberations, the jury returned verdicts of guilty on both counts. Pet. App. 2a. Each Respondent was sentenced to a term of two years probation on each count to run concurrently. The United States Court of Appeals for the Eighth Circuit vacated the convictions and remanded the case for a new trial in light of this Court's decision in *United States v. Gaudin*, 115 S. Ct. 2310 (1995), on the grounds that the

district court, rather than the jury, determined materiality. *See generally* Pet. App. 8a-14a.

The allegations involved a photocopier sales, leasing, and service company that was purchased and jointly owned by the Respondents and a convicted co-conspirator, James Russell. After the parties' purchased this company, the Respondents and Russell renamed the company Copytech Systems, Inc. (hereinafter "Copytech"). Pet. App. 3a. Respondent Wells served as the chairman of the board and secretary of Copytech, Respondent Steele served as the president, and Russell served as the chief executive officer and vice president. Record 138-40, 1585.

Russell had been vice president of sales at the predecessor company to Copytech, and he had many years of experience in the photocopy industry. Record 130-31, 284, 1098-1100, 1584. Neither Wells nor Steele had any prior experience in the sales, leasing, or service of photocopier systems. Wells was engaged in the full-time practice of law and only went to Copytech for occasional visits and status meetings. Record 494-95, 570, 1130-31, 1374-76. Steele was present at Copytech on a daily basis. However, Steele did not participate in the day-to-day management of Copytech. Record 1585-90, 1362-70. The Respondents initially relied on Russell to make all major business decisions regarding the company and its day-to-day operations. For some time, Russell was perceived by the employees as the ultimate decision maker. Record 525-27, 567-70, 145, 1106-12, 1368-75, 1585-90. However, the Respondents did become more actively involved in the company for a short time period after Russell experienced an emotional illness. Record 1666-72.

While working at the predecessor company to Copytech, Russell became familiar with a copier program that allowed the leased equipment, supplies, and service to be paid for by customers in one monthly payment. This program was also utilized by Copytech and was called Copier Management

Program, or "CMP." Record at 1116-20, 150. This program consisted of two distinct features: a lease of certain photocopier equipment and an option for a service agreement. Pet. App. 4a. Copytech customers were not required to purchase the service agreement and some customers did in fact refuse the service portion of the program. Record at 1175-78. Copytech obtained financing by selling its rights to the income under the lease agreements, but not its liabilities, to various financial institutions that would essentially discount the future income stream from the lease agreements. Pet. App. 4a. In some instances, the principals of Copytech and their respective spouses had to sign personal guarantees when Copytech obtained this financing. Record at 181-87.

The Government's theory at trial was that the Respondents and Russell conspired to withhold and conceal the fact that there was a separate service agreement related to the lease contracts that were being purchased by financial institutions. Three overt acts were submitted to the jury under the conspiracy charge. One of those acts alleged the Respondents made false statements to the banks by providing the lease contracts that stated maintenance was the responsibility of the lessee, but not providing the separate service agreement. J.A. 29, 40. The second overt act alleged that James Russell made similar false statements to banks. J.A. 40-41. The third overt act alleged that the Respondents had signed their wives' names to personal guarantees to influence the bank in purchasing the lease contracts. J.A. 28, 40. This overt act was also the substantive false statement count charged in Count Two. J.A. 30-31.

The Government's evidence regarding the conspiracy charge rested almost entirely on the testimony of James Russell. Russell testified pursuant to a plea agreement wherein he pled guilty to three counts of bank fraud and conspiracy to commit bank fraud. Pet. App. 3a n.1. Pursuant to the plea agreement, the Government agreed to consider filing a motion

for downward departure under U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) for his substantial assistance in giving testimony against the Respondents in this case. Record 128-30, 345.

Russell testified at trial that some of the financial institutions wanted Copytech to keep a reserve fund to cover "soft costs" (costs to service equipment over and above equipment costs). Record 155-56, 165-68. Russell testified that, to avoid the "soft costs" reserve, Copytech altered its lease agreement to state that the lessee was responsible for maintenance, and then a separate CMP service agreement would be added as an addenda to the lease agreement. Record 162-68. Only the lease would be sent to the financial institutions.

The Respondents at trial defended themselves, in part, on the grounds that the omission of the CMP agreement from the bank was not material. Thus, Respondent Wells testified at trial that his goal in separating the two agreements was to make the lease non-cancelable, so the rent obligation was absolute and certain, even if a dispute arose under the service agreement. Record 1143-44. This was done to insulate the banks from any responsibility or liability under the separate service agreement. Record 1153-54, 1302. Wells and Steele both denied at trial any agreements to conceal the service agreements. Record 1187, 1603-04.

Russell's testimony also indicated that officials from one of the financial institutions involved in this case were provided an overview of CMP and even inspected lease files with the CMP service agreements included in those files. Record 177-80. Russell also acknowledged that he used a flip chart in making presentations to the banks that described CMP in great detail. Record 240-41. In addition, Copytech provided financial statements to the banks that contained an extensive description of Copytech's programs, including the service agreement options. Record 255-58.

It should also be noted that, in many instances, the financial institutions required that the payments be mailed by

customers directly to a bank lock-box. Record 680-81. Since the CMP customers paid the lease and the service contract in one payment, the financial institutions would actually receive more money from the customers than the monthly lease payment. Thus, the bank knew there were additional matters outside the lease contained in the payment, and deposited the excess funds in a Copytech account.

The Respondents were also convicted of violating 18 U.S.C. § 1014 for signing their wives' names to personal guaranties.[1] At trial, the Respondents claimed that the statements were not false because they had or believed they had their wives' authority and because the signatures were not material. Record 1191, 1322-24, 1642.

After all the evidence was adduced at trial, the district court ruled that the remaining false statements in question were material. At this time, the Respondents argued to the Court that materiality should be an issue submitted to the jury.[2] Thus, this issue was properly preserved by the Respondents. *See* Pet. App. 7a n.3. When the district judge ruled on materiality issues, the Government did not argue, suggest or submit that materiality should not be an essential element of 18 U.S.C. § 1014.

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1. The evidence at trial, through the testimony of James Hayes, former chairman of O'Bannon Bank, indicated that Regulation B of the Code of Banking Regulations, 12 C.F.R. § 202.7(d)(1), prohibited financial institutions from requiring the signature of an applicant's spouse other than on a joint application for credit transaction, if the applicant otherwise qualifies under the creditor's standards of creditworthiness. Record 730-35. Thus, the Respondents argued at trial that the signatures of the wives could not have been material in light of this regulation prohibiting the bank from obtaining the spouses signatures.

2. In ruling on the issue of materiality, the district judge was also of the opinion that materiality was a jury issue. Pet. App. 8a n.4; Record 1731. However, the judge felt bound by then-controlling Eighth Circuit law which required him to determine materiality. *Id.*

The Respondents appealed their convictions to the Eighth Circuit and the Government cross-appealed on several sentencing issues. In its initial brief on appeal, the Government did not raise the issue that materiality is not an element of 18 U.S.C. § 1014. Instead, the Government consistently acknowledged throughout its brief that materiality is an element of section 1014 that the Government met its burden at trial of proving that the statements at issue were material and that the district judge acted appropriately in determining that the statements were material. J.A. 50-60.

During the pendency of the appeal to the Eighth Circuit, this Court decided *United States v. Gaudin*, 115 S. Ct. 2310 (1995). In light of *Gaudin*, the Eighth Circuit requested supplemental briefs from the parties. *See* J.A. 61-77. Only after the *Gaudin* decision and the Eighth Circuit's request for supplemental briefs did the Government raise its argument for the first time that materiality is not an essential element of 18 U.S.C. § 1014. *See* J.A. 61-69.

In its decision below, the Eighth Circuit recognized that materiality has been traditionally held to be an element of section 1014 by most courts, and has traditionally been a matter of law for the judge to decide. Pet. App. 7a, 12a. Moreover, the Eighth Circuit recognized that similar fraud statutes, like section 1014, which do not explicitly enumerate materiality in the text of the statute, nevertheless have been found by a number of courts to require materiality as an element of proof. *See* Pet. App. 10a (*citing United States v. Adler*, 623 F.2d 1287 (8th Cir. 1980). The Eighth Circuit saw no reason to treat section 1014 differently than similarly worded false statement statutes, like section 1001. Pet. App. 12a. Thus, the Eighth Circuit explicitly recognized and restated the rule that numerous other courts have previously adopted, that materiality is an essential element of section 1014. *Id.*

Since the judge determined materiality in the trial below, the Eighth Circuit concluded that the mandate of *Gaudin* was

violated. Thus, the court reversed and remanded the case for a new trial. Pet. App. 14a.

SUMMARY OF ARGUMENT

The Government consistently charged materiality in the indictment and included materiality in its instructions submitted to the district court. The Government also stood silent and did not object or otherwise argue to the district court that materiality should not be determined. Charging materiality in the indictment and including it in the instructions is effectively a concession by the government that materiality is an element in this particular case. Further, the law of the case doctrine recognizes that jury instructions, which are not objected to, become the law of the case, even if those instructions contain elements that are not necessarily included in the statutory definition of the offense. The Government's failure to object to the determination of materiality is a waiver of that issue for appellate review. The Government cannot charge materiality in the indictment, offer instructions that contain materiality as a requisite element, stand silent when the district court rules on materiality, and then reverse its position by complaining to this Court that it is entitled to relief on the issue of materiality.

Materiality is an element of 18 U.S.C. § 1014. Almost every federal circuit, with the exception of the Second Circuit, has consistently concluded that materiality is an element of section 1014, despite the lack of materiality in the actual text of the statute. Some courts have recognized that materiality in false statement offenses has been recognized at common law. Although the actual text of the statute does not contain materiality, courts have long looked beyond the text of statutes in numerous contexts, including the definition of a false statement under section 1014 to include "omissions."

The legislative history of section 1014 is also silent as to Congress' intent regarding materiality. Silence of the legislature

is not always indicative of any certainty of congressional purpose. Further, the Revisor's Notes following section 1014 indicate that Congress did not intend to make any substantive changes to the law when it consolidated 13 predecessor statutes into section 1014. This statement in the Revisor's Notes indicates that Congress overlooked the issue of materiality when it enacted section 1014. Further, the Revisor's Notes reveals an ambiguity regarding congressional intent regarding materiality. When such an ambiguity exists, that ambiguity should be resolved in favor of lenity. Further, courts are not bound by the text of the statute when the congressional intent indicates that Congress has made a drafting error in enacting the statute.

Courts have recognized that broad-sweeping criminal statutes with potentially harsh penalties should be strictly construed. The importance of materiality in section 1014 cases is to exclude from prosecutions trivial or insignificant false statements that are not capable of influencing financial institutions.

Finally, if materiality is not an element of section 1014, the Judge's instructions to the jury in this case that define materiality, use materiality to define whether a statement is false, and then instruct the jury to disregard any considerations of materiality essentially took away from the jury the determination of the elements of "for the purpose of influencing" and whether the statement was "false," which are undisputed elements of a section 1014 offense.

Thus, for all of these reasons, this Court should conclude that materiality is an element of a section 1014 offense, and that materiality should be decided by the jury. Therefore, this case should be remanded to the district court. However, if this Court decides that materiality is not a required element of section 1014, because the district court's jury instructions preempted the jury or unduly suggested to the jury what its decision should be with respect to other elements of

section 1014, this case must still be remanded to the district court.

ARGUMENT

I. THE GOVERNMENT IS PRECLUDED FROM RAISING THE ISSUE THAT MATERIALITY IS NOT AN ELEMENT OF 18 U.S.C. § 1014 WHERE THE GRAND JURY INDICTMENT CHARGED MATERIALITY AS AN ELEMENT OF THE OFFENSES, THE JURY INSTRUCTIONS REQUESTED BY THE GOVERNMENT AND SUBMITTED TO THE JURY INCLUDED MATERIALITY AS AN ELEMENT OF THE OFFENSES, AND WHERE THE GOVERNMENT DID NOT OBJECT OR OTHERWISE ARGUE TO THE DISTRICT COURT THAT MATERIALITY IS NOT A REQUISITE ELEMENT OF SECTION 1014 WHEN THE DISTRICT COURT MADE ITS RULINGS REGARDING MATERIALITY.

The Government is asking this Court to determine whether the materiality of a false statement is a required element to prove a violation of 18 U.S.C. § 1014, which makes it an offense to knowingly make a false statement or report for the purpose of influencing in any way the action of a federally insured bank. However, the Government included materiality as a requisite element of the offenses charged in the indictment and in the jury instructions it offered to the district court, which were ultimately submitted to the jury. The Government did not raise this issue at any time during the trial below or in any of the opening appellate briefs submitted to the United States Court of Appeals for the Eighth Circuit. Only after the Eighth Circuit requested supplemental briefs in light of *United States v. Gaudin*, 115 S. Ct. 2310 (1995), regarding its application to the present case, did the Government claim for the first time that materiality is not an element of section 1014. For the reasons submitted herein, the Government cannot charge materiality in

the indictment, offer instructions that contain materiality as a requisite element, stand silent when the district court makes its rulings regarding materiality, and then completely reverse its position by complaining to this Court that it should somehow be entitled to relief on the issue of materiality.

A. The Grand Jury Indictment Charged Materiality

The indictment included numerous allegations of materiality as an element of the charged offenses. For example, Count One of the Indictment alleges that the Respondents "made and caused to be made false statements and representations and withheld information of *material fact* for the purpose of influencing . . . ." J.A. 24 (emphasis added). Count One goes on to allege: "JERRY E. WELLS and KENNETH R. STEELE knowingly withheld and caused to be withheld . . . *material* information concerning the lease contracts . . . ." J.A. 25 (emphasis added).[3] In addition, the substantive false statement charge in Count Two included materiality as an element of the offense: "JERRY E. WELLS and KENNETH R. STEELE knowingly made and caused to be made false statements of *material fact* to O'Bannon Bank . . . ." J.A. 31 (emphasis added). Thus, materiality was consistently included as an element of the offenses charged in the indictment by the grand jury.

Since materiality was included as an element of the offenses charged, the Government was required to prove materiality in this particular case. This Court has long recognized the fundamental rule that a defendant has the distinct constitutional right, protected by the Fifth Amendment, to be

3. There were additional references to materiality in the conspiracy count regarding the objects and overt acts of the other substantive false statement counts, which were ultimately dismissed by the district court. *See generally* J.A. 18-34.

tried only upon those charges found by a grand jury. *See, e.g., Stirone v. United States*, 361 U.S. 212, 215-16 (1960); *see also United States v. Staniforth*, 971 F.2d 1355, 1357 (7th Cir. 1992) ("In the federal system, if you are indicted for X, you cannot be convicted of Y . . . because that would deny you your right not to be charged with a federal crime other than by a grand jury."); *United States v. Camp*, 541 F.2d 737, 740-41 (8th Cir. 1976). Only a grand jury, and not a trial court, can materially amend a criminal indictment. *Stirone*, 361 U.S. at 215-16.[4] In the present case, the words of the indictment evidence that the grand jury considered and included materiality as an essential element of the charged conduct.

Any suggestion that materiality could somehow be "deleted" from the indictment as mere surplusage would be an impermissible amendment to the indictment. An exception to the general rule that an indictment cannot be amended except by the grand jury has been recognized which allows a court to eliminate surplusage as a matter of form if nothing is added to the indictment and the remaining allegations state the essential elements of the offense. *See, e.g., United States v. Nabors*, 762 F.2d 642, 647 (8th Cir. 1985). Permissible amendments include the correction of obvious clerical or typographical errors. *E.g. United States v. Fields*, 875 F.2d 130, 133 (7th Cir. 1989). Courts may also ignore as surplusage allegations in an indictment that are additional offenses independent from the offense of conviction or allegations that are additional methods to commit the offense of conviction. *See, e.g., United States v.*

4. *Stirone* involved an expansion of the charges outlined in an indictment without further grand jury action. *Stirone*, 361 U.S. at 216. The Court recognized the inherent constitutional violation that occurs when a defendant is tried on charges that are not made in the indictment. *Id.*

Miller, 471 U.S. 130, 135-36 (1985).[5] However, none of these circumstances are present in this case. To somehow ignore or delete materiality as surplusage would be an improper and unconstitutional amendment of the indictment in violation of the Fifth Amendment right to be charged by grand jury indictment.

In addition, the fact that the indictment charges materiality as a requisite element of the offenses is an effective concession by the Government that materiality must be proved in this particular case. This circumstance was addressed by the First Circuit in *United States v. Norberg*, 612 F.2d 1 (1st Cir. 1979), which also involved 18 U.S.C. § 1014. In *Norberg*, the Government charged the defendant under section 1014 with making or causing to be made "materially false statements." *Id.* at 1, n.3. The court concluded that, since the indictment charged materiality, the Government conceded, for the purposes of the case, that it had to prove materiality. *Id.* Thus, the First Circuit did not even reach the ultimate question of whether

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5. The Government's reply brief in seeking certiorari suggested that materiality could be ignored or deleted as surplusage or as a useless averment, under *United States v. Miller*, 471 U.S. 130 (1985). *See* Govt. Reply Br. to Br. in Opp. on Cert. 4-5. The *Miller* Court concluded that if the offense of conviction is fully and clearly set out in the indictment, the constitutional right to a grand jury may not be violated if the indictment alleged more crimes or independent means of committing the same crime. *Id.; see also Ford v. United States*, 273 U.S. 593, 602 (1927) (indictment charging violation of federal law as one offense and violation of a treaty as another independent offense, even though the treaty did not create a separate offense, was deemed valid because the treaty offense could be deleted or ignored as mere surplusage). These cases allow surplusage to be ignored only if it is unnecessary to and independent of the offenses of conviction. *Miller*, 471 U.S. at 136; *Ford*, 273 U.S. at 602. In contrast to these cases, materiality in this case is an inextricable element of the offenses of conviction that is not an independent offense or an independent means of commiting the offenses of conviction. Thus, *Miller* and *Ford* cannot be relied on by the Government to suggest that materiality can be ignored in this case.

materiality is an essential element of section 1014 cases in general. *Id.*[6] The Government's inclusion of materiality in the indictment is thus an effective concession that it must prove materiality as a requisite element in this particular case.

B. The Government's Jury Instructions Included Materiality

The Government also included materiality in its jury instructions offered to the district court and ultimately submitted to the jury. In this regard, Instructions 13, 15, 18, and 20, which were all offered by the Government, included materiality as a requisite element. J.A. 38-43. In fact, Instruction 20 defined materiality, but then instructed the jury that it should not be concerned with the issue of materiality.[7] J.A. 42-43.

The Federal Rules of Criminal Procedure preclude a party from assigning as error any portion of the jury instructions or omissions therefrom unless that party objects to the instructions before the jury retires to consider its verdict. Fed. R. Crim. P. 30. In addition, a party cannot complain as to the language or contents of a jury instruction which that party itself requested and to which the party did not object after the instruction was submitted to the jury. *United States v. Jacoby*, 955 F.2d 1527, 1544 (11th Cir. 1992), *cert. denied*, 507 U.S.

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6. The *Norberg* opinion predated subsequent First Circuit opinions that did in fact conclude that materiality is a requisite element of section 1014. *See, e.g., United States v. Lopez*, 71 F.3d 954, 960-61 (1st Cir. 1995); *United States v. Concemi*, 957 F.2d 942, 951 (1st Cir. 1992).

7. Instruction 20 stated in relevant part: "A statement or representation is 'false' when it is untrue when made or effectively conceals a material fact. A material fact is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction." J.A. 42.

920 (1993). The Government's claim that materiality is not a required element under section 1014 rings hollow in light of the fact that the Government charged materiality in the indictment and requested materiality in its jury instructions offered to the district court, which were ultimately submitted to the jury.

Materiality is thus a requisite element in this particular case under the doctrine of "the law of the case." Numerous federal courts have recognized that a jury instruction which is not objected to becomes the law of the case. *See, e.g., United States v. Jokel,* 969 F.2d 132, 136 (5th Cir. 1992) (a jury instruction that increases the Government's burden and to which the Government does not object becomes the law of the case); *United States v. Abod,* 770 F.2d 1293, 1295 n.1 (5th Cir. 1985); *United States v. Johnson,* 495 F.2d 242, 243-44 (10th Cir. 1974).

Several federal appellate courts have invoked the "law of the case" doctrine in analyzing cases brought under the federal escape from custody statute, 18 U.S.C. § 751. Although some of these courts concluded that specific intent was not a requisite element under section 751, they nevertheless concluded that, since instructions were submitted to the jury that required a finding of specific intent, without any objection from the Government, then specific intent was a requisite element of these cases under the law of the case doctrine. *E.g. United States v. Tapio,* 634 F.2d 1092, 1094 (8th Cir. 1980); *United States v. Spletzer,* 535 F.2d 950, 954 (5th Cir. 1976); *United States v. Woodring,* 464 F.2d 1248, 1251 (10th Cir. 1972).

Similarly, the Tenth Circuit was confronted with the issue of whether a RICO conspiracy requires proof that the defendant personally agreed to commit two predicate acts or whether the defendant agreed that any conspirator would commit the two predicate acts. *See United States v. Killip,* 819 F.2d 1542, 1547-48 (10th Cir. 1987), *cert. denied,* 484 U.S. 865 (1987). However, the court did not even reach or

determine this issue because the jury had been instructed that the defendant must personally agree to commit the predicate acts of the conspiracy. Thus, this particular statement of the law became the law of the case. *Id.*

The *Abod* decision involved whether the Government must prove that a defendant had knowledge that a credit card was counterfeit in a prosecution for using counterfeit credit cards. However, the jury at trial was instructed that the defendant could not be convicted of using a counterfeit card unless the Government proved that he knew the card was actually counterfeit. Since the Government did not object to this instruction, the instruction and the requirement that the defendant have knowledge of the counterfeit nature of the credit card became the law of the case. *Abod,* 770 F.2d at 1295 n.1. Since the *Abod* court invoked the law of the case doctrine, it did not reach the ultimate question of whether knowledge of the counterfeit nature of the card was a requisite element. *See id.*

These decisions are directly applicable to this case. The government's jury instructions contained materiality as a requisite element. The instructions that included materiality thus became the law of this case. Even if this Court chooses to address the general question whether materiality is an element in section 1014 cases, there is no question that materiality became a requisite element in this case under the law of the case doctrine.

C. Failure to Object

In addition to the indictment and the jury instructions, the Government did not lodge any objection, or otherwise make a record before the district court, that materiality should not be an element of section 1014. In this instance, the district judge

determined the issue of materiality.[8] The Government stood silent when this determination was made. The Government did not object or otherwise assert that materiality should not be determined, by either the judge or the jury, when these rulings were made.

A principal rule of appellate procedure is that, when a litigant fails to raise a challenge in a timely fashion, or concedes an issue below, it cannot be raised in later proceedings. *See, e.g., Steagald v. United States*, 451 U.S. 204, 208-09 (1981); *Pembaur v. City of Cincinnati*, 882 F.2d 1101, 1106 (6th Cir. 1989); *United States v. Morales*, 737 F.2d 761, 763 (8th Cir. 1984). Counsel cannot remain silent, let the claimed error take place, and then object to the error later. *United States v. Carr*, 965 F.2d 408, 411 (7th Cir. 1992). *See also United States v. Thompson*, 811 F.2d 841, 843 (5th Cir. 1987) (jury instruction that contained materiality in a section 1014 prosecution was permissible because materiality has been recognized as an element, and the Government did not object to the jury instruction). The Government should not now be allowed to reverse itself and take a contrary position from its position at trial.

Further, the Government is precluded from raising this issue under the invited error doctrine. A party is precluded from arguing on appeal those errors which he invited or provoked the court below to commit. *See, e.g., United States v. Sharpe*, 996 F.2d 125, 129 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 400 (1993); *United States v. Schmurstein*, 977 F.2d 449, 455 (8th Cir. 1992); *United States v. Ward.*, 914 F.2d 1340,

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8. Both respondents objected to the judge determining materiality instead of the jury and thus properly preserved the record in this regard. The district judge agreed with the respondents that the issue of materiality should be submitted to the jury, but he felt bound by then controlling Eighth Circuit law which mandated that materiality was an issue for the court and not the jury. Pet. App. 8a n.4; Record 1737.

1344 (9th Cir. 1990). *See also United States v. Johnson*, 26 F.3d 669, 677 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 344 (1995). Instead of objecting or otherwise arguing that materiality should not be an element, the Government chose to stand silent and allow materiality to be a critical and essential aspect of the trial below.

Interestingly, the Government's opening briefs submitted to the Eighth Circuit on appeal also acknowledged that materiality was an element of section 1014. J.A. 50-60. Only after the *Gaudin* decision and the Eighth Circuit's request for supplemental briefs did the Government claim for the first time that materiality is not an element under section 1014. *See* J.A. 61-77.

The Government's suggestion that it had no reason to raise this challenge prior to the *Gaudin* decision because district judges routinely determined materiality in the Government's favor exhibits an inherent distrust for our jury system long praised as the most fundamental aspect of our criminal justice system. Pet. for Cert. 13-14. The issue whether the judge or the jury determines materiality should be irrelevant to the Government's argument in this case. Only after *Gaudin* shifted the responsibility of determining materiality to a jury did the Government raise its new argument regarding materiality in an attempt to avoid the mandate of *Gaudin*, a mandate that the government clearly dislikes.

The Government's prayer for relief further amplifies the procedural difficulties presented in this particular case. The Government simply prays that the Eighth Circuit decision should be reversed and, presumably, the convictions from the district court should be affirmed. However, if the relief prayed for by the Government was granted, this Court would affirm convictions in which materiality *was* an element of 18 U.S.C. § 1014 and in which the judge, rather than the jury, determined materiality. The first instance would be the exact opposite result of the Government's argument herein, while the second

instance would violate the mandate of *United States v. Gaudin*, 115 S. Ct. 2315 (1995). These procedural difficulties are the precise reason why courts have developed and recognized doctrines, such as the law of the case, which prevent a litigant from reversing its position on appellate review. The decision of the Eighth Circuit must be affirmed.

II. THE COURT OF APPEALS CORRECTLY RECOGNIZED THAT MATERIALITY IS AN ESSENTIAL ELEMENT OF 18 U.S.C. § 1014 AND IS A QUESTION FOR THE JURY TO DETERMINE.

Throughout the course of this trial, materiality was "hotly contested" and a very significant aspect of the proof adduced at trial. *See United States v. Wells*, 63 F.3d 745, 749 (8th Cir. 1995). At the close of all of the evidence, the district court determined that the statements in issue were material, over the respondents' objections that materiality should be submitted to the jury. Pet. App. 8a n.4.

During the appeal of the convictions to the United States Court of Appeals for the Eighth Circuit, this Court decided *United States v. Gaudin*, 115 S. Ct. 2315 (1995). The *Gaudin* decision involved 18 U.S.C. § 1001, which criminalizes making false statements in a matter within the jurisdiction of a federal agency. The parties in *Gaudin* stipulated that materiality was an element of the offense under section 1001. *See Gaudin*, 115 S. Ct. at 2313.[9] The issue presented was whether the jury or the judge should determine materiality.

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9. It should be noted that while the first phrase creating a violation of section 1001 uses the word "material" as an adjective to qualify the word "fact," "material" is not used in the second phrase creating a violation of section 1001. The statutory language which identifies a violation of section 1014 parallels the language of the second phrase of section 1001.

This Court held that criminal convictions must rest on a jury determination that the defendant is guilty of every element of a crime beyond a reasonable doubt. *Gaudin*, 115 S. Ct. at 2313. A defendant's Sixth Amendment right to a jury trial mandates that the jury determine whether the element of materiality has been established. *Id.* Thus, *Gaudin* requires that when materiality is an element of the offense, it must be submitted to and determined by the jury.[10]

After the *Gaudin* decision, the Eighth Circuit requested supplemental briefs from the parties regarding the applicability of *Gaudin* to this case. Only after this request for supplemental briefs did the Government claim for the first time that materiality is not an element under section 1014. J.A. 61-69. However, the Eighth Circuit recognized that materiality has long been recognized as a requisite element under 18 U.S.C. § 1014. Pet. App. 12a. Moreover, the Eighth Circuit recognized that fraud statutes similar to section 1014, which do not explicitly enumerate materiality in the text of the statute, nevertheless have been found by a number of courts to require materiality as an element of proof. *See* Pet. App. 10a (*citing United States v. Adler*, 623 F.2d 1287 (8th Cir. 1980)). The Eighth Circuit saw no reason to treat section 1014 differently than similarly worded false statement statutes, like section 1001. Pet. App. 12a. Thus, the Eighth Circuit explicitly recognized and restated the rule that numerous other courts have previously

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10. After the *Gaudin* decision, this Court has granted certiorari, vacated the judgment, and remanded several similar cases for further consideration in light of *Gaudin*. *See, e.g., Knapp v. United States*, 116 S. Ct. 666 (1995) (conviction involving the filing of false currency transaction reports was remanded in light of *Gaudin*); *Daughtry v. United States*, 116 S. Ct. 510 (1995); *Gatewood v. United States*, 116 S. Ct. 510 (1995) (conviction for making a false statement to the Navy was remanded in light of *Gaudin*); *Waldron v. United States*, 116 S. Ct. 333 (1995) (conviction under 18 U.S.C. § 1014 remanded in light of *Gaudin*); *Porat v. United States*, 115 S. Ct. 2604 (1995) (conviction under 18 U.S.C. § 1623, remanded in light of *Gaudin*).

adopted, that materiality is an essential element of section 1014. *Id.*

A. Nearly Every Federal Circuit has Found Materiality to be a Requisite Element of 18 U.S.C. § 1014

Nearly every federal circuit, with the exception of the Second Circuit, has held that materiality is a requisite element of 18 U.S.C. § 1014. *See, e.g., United States v. Nash*, 76 F.3d 282, 284 (9th Cir. 1996); *United States v. Lopez*, 71 F.3d 954, 960 (1st Cir. 1995), *cert. denied*, ___ U.S. ___ 1996 U.S. LEXIS 3962 (1996); *United States v. Spears*, 49 F.3d 1136, 1141 (6th Cir. 1993); *United States v. Haddock*, 956 F.2d 1534, 1549 (10th Cir. 1992), *cert. denied*, 506 U.S. 828 (1992); *United States v. Ribaste*, 905 F.2d 1140, 1143 (8th Cir. 1990); *United States v. Shriver*, 842 F.2d 968, 976-77 (7th Cir. 1988); *United States v. Ryan*, 828 F.2d 1010, 1013-14 & n.1 (3rd Cir. 1987); *United States v. Thompson*, 811 F.2d 841, 843 (5th Cir. 1987); *United States v. Whaley*, 786 F.2d 1229, 1231 (4th Cir. 1986); *United States v. Scott*, 701 F.2d 1340, 1345 (11th Cir. 1983), *cert. denied*, 464 U.S. 856 (1983); *United States v. Mangieri*, 694 F.2d 1270, 1279 n.8 (D.C. Cir. 1982). In addition, federal courts have recognized that materiality, although not necessarily included in the actual text of the statute, is nevertheless a requisite element of other false statement statutes. *See, e.g., United States v. Beer*, 518 F.2d 168, 170-71 (5th Cir. 1975) (to exclude trivial falsehoods, courts have read a materiality requirement into the second clause of 18 U.S.C. 1001); *United States v. Adler*, 623 F.2d 1287, 1291 n.5 (8th Cir. 1980) (18 U.S.C. § 287 should be treated no differently than 18 U.S.C. § 1001; materiality is thus an element of section 287).

The only circuit that has not explicitly recognized materiality as an element of a section 1014 offense is the Second

Circuit. In the 1977 opinion of *United States v. Cleary*, 565 F.2d 43, 46 (2d Cir. 1977), *cert. denied*, 435 U.S. 915 (1978), the Second Circuit rejected an argument advanced on appeal that the trial court erred in failing to instruct the jury that the statements made were false as to a material matter. *Cleary*, 565 F.2d at 46. In its decision, the *Cleary* court quoted a previous Second Circuit decision which had rejected the argument that actual reliance by the bank on the false statements is an element under section 1014. *United States v. Sabatino*, 485 F.2d 540, 574 (2d Cir. 1973), *cert. denied*, 415 U.S. 948 (1974). Quoting *Sabatino*, the *Cleary* court stated that "[i]t does not lie with one knowingly making false statements . . . to say that the statements were not influential or the information not important." *Cleary*, 565 F.2d at 46 (*quoting Sabatino*, 485 F.2d at 574). However, the *Cleary* opinion goes on to state that "[i]n any event, any question of materiality would be for the court, not the jury." *Cleary*, 565 F.2d at 46. By this second statement, the Second Circuit seemed undecided as to whether materiality is not an element of section 1014, or whether materiality is an element but should be determined by the court. In light of the fact that *Cleary* is not clearly decisive as to this issue and in light of the fact that *Cleary* was decided some time ago, the Second Circuit's view of materiality is not persuasive.

The element of materiality has deep-rooted foundations in the area of criminal false statements. In recognizing materiality as a requirement for section 1014 offenses, the Fifth Circuit noted that materiality was an element in false statement offenses, like perjury, at common law:

> Sir Edward Coke wrote in 1680 that perjury is a crime committed by one "who sweareth absolutely, and falsely in a matter material to the issue." 3 E. Coke, Institutes 164 (6th ed. 1680). Otherwise, as Blackstone stated, "if it only be in some trifling collateral circumstance, to which

> no regard is paid, it is not penal." 4 W. Blackstone, Commentaries *137.

United States v. Williams, 12 F.3d 452, 456 (5th Cir. 1994). The *Williams* court noted that "[s]ection 1014 was not designed to convict on a technicality." *Id.* at 458.[11] Implicit in the overwhelming majority of federal appellate court opinions is the need to filter out criminal convictions based on such trivial or harmless statements, even if the defendant's purpose or intent was otherwise unlawful.

B. The Actual Text of the Statute Does not Indicate that Materiality Cannot be an Element of a Section 1014 Offense

The actual text of section 1014 does not contain an explicit reference to materiality. Nevertheless, appellate courts have historically determined that materiality should be an

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11. Materiality has also been included in the definitions of criminal offenses involving deception. For example, the Model Penal Code defines the term "deceives" as used to define the offense of theft by deception, as follows:

> The term "deceives" does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed.

See The American Law Institute, THE MODEL PENAL CODE, § 223.3 (1980). Additionally, the Model Penal Code includes materiality in its definition of perjury. *See id.* at § 241.1, at 116 n.52 (recognized that materiality was an element of perjury at common law). Similarly, the definition of false swearing uses materiality as a grading factor to determine whether the falsification is treated as a felony or a misdemeanor. *See id.* at § 241.2(1)(a). Thus, materiality has been recognized in various criminal contexts as a required element of proof in false statement offenses.

element of the offense, even though it is not explicitly enumerated in section 1014.

It is true that the starting point in any issue of statutory construction is the actual text of the statute. However, when Congress has not addressed a specific issue or has done so ambiguously, statutory interpretation ceases to be solely a problem of discovering the plain meaning of the statute.[12]

There are numerous situations where courts have looked beyond statutory language that appears rather clear in the text of the statute, but becomes ambiguous in application. For

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12. The Government's suggestion in this case that the actual text of the statute is controlling, runs contrary to the position that courts have taken regarding the interpretation of section 1014. Thus, some of the allegations in the present case involved an omission, i.e., that the Respondents failed to disclose to the banks that there was a separate service agreement in addition to the leasing agreements. A strict reading of the textual language of 18 U.S.C. § 1014, as suggested by the Government, does not include the term "omissions" under the definition of the offense. The language of the statute refers to "a false statement or report." It does not refer to omissions nor does it define "statement" to include omitted information. Under a strict application of the government's argument, the conduct of omitting information would not fall within section 1014.

This argument was advanced by the Respondents in the Eighth Circuit. The Eighth Circuit ruled, however, that section 1014 should be interpreted to encompass omissions of material information. *United States v. Wells*, 63 F.3d 745, 751-52 (8th Cir. 1995). Other appellate courts have also construed or interpreted section 1014 to apply to omissions cases as well. *See, e.g., United States v. Haddock*, 956 F.2d 1534, 1549-50 (10th Cir. 1992); *cert. denied*, 506 U.S. 828 (1992); *United States v. Ryan*, 828 F.2d 1010, 1017 (3rd Cir. 1987) (statement includes nonverbal conduct); *United States v. Trixler*, 474 F.2d 369, 370-71 (5th Cir. 1973), *cert. denied*, 412 U.S. 929 (1973). These courts have recognized that most federal statutes are subject to judicial interpretation. In these instances, "omitted information" has been construed to be encompassed within the definition of a "false statement," even though this construction is not supported by a strict, textual reading of section 1014. Like the "omissions" cases, materiality has also been construed to apply to the definition of a false statement. Although the actual text of a statute is a starting point, the analysis should not always end there.

example, this Court has on several occasions implied a mental intent term in federal criminal statutes that do not enumerate such a term. *See, e.g., Morisette v. United States*, 342 U.S. 246 (1952); *Liparota v. United States*, 471 U.S. 419 (1985); *Staples v. United States*, 114 S. Ct. 1793 (1985); *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994). Although the text of these statutes seems rather clear, the Court has held that *mens rea* is so fundamental that Congress' silence does not necessarily signal an intent to dispense with those requirements. *Staples*, 114 S. Ct. at 1797.

Courts have similarly looked beyond the text of the Sherman Act to define what conduct is a restraint of trade or commerce or an attempt or conspiracy to monopolize. *See generally* Richard A. Posner, *Statutory Interpretation: In the Classroom and Courtroom*, 50 U. CHI. L. REV. 800, 808 (1983) ("Lawyers and judges do not begin their analyses of a challenged practice by comparing the practice with the language of the [Sherman] Act . . . . They start with case law and may never return to the statutory language."). Additionally, courts have held that the federal diversity jurisdiction statute, 28 U.S.C. § 1332, does not apply to domestic relations cases, despite any mention of "domestic relations" in the text of the statute. *See Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*, 490 F.2d 509, 512-15 (2d Cir. 1973). These examples demonstrate that the text of a statute often times must be interpreted by courts to effect its true purpose.

C. The Legislative History of Section 1014 Does not Indicate an Intent by Congress to Dispense With the Materiality Element

The Government's reliance on congressional intent and the legislative history of section 1014 is also misplaced. The Government suggests that since section 1014 was a consolidation of thirteen predecessor statutes, some of which

contained materiality and some of which did not, then Congress must have somehow intended to delete materiality as an element of the offense. Govt. Br. 13-15. However, the legislative history of section 1014 is completely silent regarding materiality.[13]

At most, the legislative history of section 1014 creates an ambiguity of congressional purpose that must be resolved in favor of the Respondents. It is difficult to determine if congressional silence indicates that the text represents acquiescence in a particular interpretation or if Congress simply was not aware of the issue. This is why this Court has not always been convinced that legislative silence indicates acquiescence. The silence of the legislature can be construed as consistent with the intent to leave the problem as it remains as much as it can be consistent with an adoption of a case rule by simple silence. *See Girouard v. United States*, 328 U.S. 61, 69-70 (1946). It is impossible to assert with any degree of certainty that Congress' silence on the issue represents:

> 1) approval of the status quo, as opposed to 2) inability to agree upon how to alter the status quo, 3) unawareness of the status quo, 4) indifference to the status quo, or even 5) political cowardice.

Johnson v. Transportation Agency, Santa Clara County, California, 480 U.S. 616, 672 (1987) (*Scalia, J., dissenting*).

In *Boys Market, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970), the Court re-examined the holding

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13. The Government also suggests that Congress is familiar with the holdings of the federal courts and should have been familiar with the holding in *Kay*. Govt. Br. 18. However, as stated *infra*, Section F, *Kay* involved actual reliance and did not explicitly address materiality, except for the one statement regarding the importance of the information.

in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), concerning the anti-injunction provisions of the Norris-LaGuardia Act. In the opinion authored by Justice Brennan, the Court held that conclusive weight should not be accorded to the failure of Congress to respond to the *Sinclair* holding on the assumption that congressional silence indicates congressional acceptance. The Court cautioned that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Boys Market*, 398 U.S. 241-42 (*quoting Girouard*, 328 U.S. at 69-70). Justice Brennan further stated that in the absence of "any persuasive circumstances evidencing a clear design that congressional inaction be taken as acceptance . . ., the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision." *Id.*, at 241-42 (citing *Helvering v. Hallock*, 309 U.S. 106, 119-20 (1940)).[14]

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14. *Compare Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616 (1987); *United States v. Shabani*, 115 S. Ct. 382 (1994). The Court in *Johnson* relied in part on Congress' inaction in regards to a "widely publicized decision that addressed a prominent issue of public debate," Title VII affirmative action plans, to support their holding. 480 U.S. at 629 n.7. Due to the highly publicized issue and decision in *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1987), the Court believed that legislative inattention was not a plausible explanation for congressional inaction and that Congress had an opportunity to demonstrate disagreement with the holding. Likewise, *Shabani* involved the exclusion of an overt act requirement in the drug conspiracy statute, 21 U.S.C. § 846. The legislative history did not address the overt act requirement, which is an explicit requirement under the general conspiracy statute, 18 U.S.C. § 371. This Court noted that Congress' silence in this case "speaks volumes." *Shabani*, 115 S. Ct. at 385. However, the Court relied in large part on the fact that the same session of Congress passed another statute in that same year, the Organized Crime Control Act of 1970, 84 Stat. 922 § 802(a), which contained an explicit overt act requirement. Unlike *Shabani*, the enactment of section 1014 in this case included Revisor's Notes indicating that no substantive changes were intended by the consolidation. Thus, Congress' general silence coupled with Revisor's Note cannot "speak volumes" as to Congress' intent regarding materiality. If anything, the Revisor's Notes "speak volumes" that Congress did not even consider materiality to any degree. Thus, *Shabani* is distinguishable from the present case.

However, if the silence of Congress is utilized to interpret section 1014, the recent amendments to the statute should also be considered. Some of these recent amendments were passed after the numerous federal appellate opinions were written that recognized materiality as a requisite element of section 1014.[15] Although these amendments have generally involved the addition of federal entities to the ambit of the statutory prohibition, Congress should be deemed to be aware of the numerous appellate decisions from nearly every federal circuit that recognized materiality as an element of section 1014, as well as many other false statement statutes. This congressional silence during all of these recent amendments may indicate that Congress was in agreement with these federal circuits since it took no action to clarify, amend, or overrule the appellate courts' decisions regarding materiality.

In addition, the legislative history of section 1014 indicates that Congress overlooked the materiality issue entirely, thus creating an amibiguity as to the intent of Congress. As stated previously, the Reviser's Notes following section 1014 reveals that Congress made changes to the phraseology of the original statutes to "secure uniformity of style . . . but the consolidation was without change of substance except as noted [in the revisor's notes]." *See* 18 U.S.C. 1014, Revisor's Notes (1976).[16]

This statement by the Revisor of Statutes is a clear indication that Congress may have completely overlooked the

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15. *See generally* Revisor's Notes, 18 U.S.C. § 1014.

16. The only changes of any substance indicated in the revisor's notes involved the form of punishment proscribed and an enumeration of the terms and transactions incorporated into the statute. *Id.*

fact that some of the predecessor statutes contained materiality while others did not. There is no question that the deletion of the materiality requirement from some of the predecessor statutes would constitute a material change of the law in substance. Thus, Congress did not intentionally delete the element of materiality or even consider it to any degree.

The ambiguities created by congressional silence have been addressed by this Court in cases involving statutes that lack a mental intent term in the definition of the offense. In these cases, the Court has noted that silence regarding mens rea does not necessarily suggest that Congress intended to dispense with a mental intent requirement. *See, e.g., Staples v. United States,* 114 S. Ct. 1793, 1797 (1994).

As discussed *supra*, this Court has implied a mental intent element where no such element was stated in the text of the statute. Just as the element of mens rea protects a citizen from being criminally punished for inadvertent conduct, materiality protects a citizen from suffering harsh criminal penalties for trivial or insignificant matters. Both concepts are rooted in our system to ensure fairness when harsh criminal penalties are involved.[17]

D. The Application of the Rule of Lenity

As discussed above, the congressional silence regarding materiality in the original enactment of section 1014, as well as the Revisor's Notes indicating that no substantive changes to the law was intended as a result of the consolidation, creates an

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17. Another longstanding canon of statutory construction is that statutes should be construed to save them from being invalidated and to avoid serious constitutional questions. *See, e.g., United States v. Rumely,* 345 U.S. 41, 45 (1953). This canon has been utilized by various courts to save a statute from vagueness, overbreadth, constitutional questions, and other legal deficiencies.

ambiguity as to the true purpose of Congress. When such ambiguity exists, this Court has held that any ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. *See, e.g., Liparota,* 471 U.S. at 427.

> Although the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time-honored interpretive guideline when the congressional purpose is unclear.

Liparota, 471 U.S. at 427. The rule of lenity applies only when, after consulting traditional canons of statutory construction, a court is left with an ambiguity. *E.g., United States v. Shabani,* 115 S. Ct. 382, 386 (1994); *Staples v. United States,* 114 S. Ct. 1804 n.17 (1994). *See generally,* Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION, § 59.03 at 102 (5th ed. 1992) (rule of lenity in determining ambit of criminal statutes is particularly appropriate where legislative history of statute is not clear). Clearly, the rule of lenity would require that materiality is an element.

E. When Congressional Drafting Errors Occur, Courts are not Bound to Read Statute Literally

Where the legislative history indicates that Congress has made a drafting error, courts are not necessarily bound to read the statute literally. *See, e.g., United States v. Falvey,* 676 F.2d 871, 875 (1st Cir. 1982). In *Falvey,* the court analyzed a newly revised statute involving the crime of possessing false, forged or counterfeit coins. The legislative history indicated that the only change intended was for the Act to cover any coins in excess of five cents. *Id.* at 875. However, the amended statute also deleted from the statute a long-recognized definition that limited

the scope of this statute to foreign coins only in current circulation. *See id.* at 874. In determining whether it should apply this limitation, the First Circuit held that Congress did not intend to substantially change the statute in light of the legislative history indicating that Congress did not intend to make any substantial changes. *Id.* at 875. The First Circuit held that courts are not bound to read a statute literally in a manner inconsistent with the history and apparent intent of Congress. *Id.*; *see also* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 849 (1992) (discussing the *Falvey* decision). Here, the Revisor's Notes to section 1014 clearly indicate that no substantive changes were intended by Congress. Thus, the language of section 1014 need not be read literally and it is appropriate to require materiality as a requisite element.

F. The Government's Reliance on *Kay*, *Williams*, and *Kungys* is Misplaced

The Government cites *Kay v. United States*, 303 U.S. 1 (1938), for the proposition that materiality is not an element of section 1014. However, *Kay* involved a predecessor statute to section 1014, 12 U.S.C. § 1467(a) (1933), which prohibited making a false statement or willfully overvaluing any security for the purpose of influencing the Home Owner's Loan Corporation. *See Kay*, 303 U.S. at 3, n.1. In *Kay*, the petitioner argued that the statements would not have directly influenced any loan made by the corporation. The Court held that one charged with making a false statement cannot claim that the "statements were not influential or the information not important." *Kay*, 303 U.S. at 5-6. The only possible portion of the *Kay* decision that involves materiality is ostensibly the language that a defendant cannot claim that the "information is not important."

Thus, *Kay* does not support the government's arguments. The opinion was pronounced in 1938 and involved a different statute. *Kay* clearly addressed the issue of not having to prove actual reliance by the bank, but did not analyze or address the issue of materiality, except for the one sentence regarding the importance of the information. Several appellate courts have cited *Kay* for the general rule that actual reliance on behalf of the financial institution is not an element of the offense defined in section 1014. *See, e.g., United States v. Stephens*, 779 F.2d 232, 237 (5th Cir. 1985); *United States v. Johnson*, 585 F.2d 119, 124 (5th Cir. 1978); *United States v. Goberman*, 458 F.2d 226, 229 (3rd Cir. 1972). However, these decisions in the very same discussion of *Kay* recognized or concluded that materiality is a requisite element of section 1014. Thus, these courts clearly view *Kay* as an actual reliance case, and not dispositive or applicable to the issue of materiality. *Kay* is inapplicable to the issues presented in this case.

The Government also suggests that *Williams v. United States*, 458 U.S. 279 (1982), may suggest that materiality is not an element of section 1014. Govt. Br. at 15 n.7. In *Williams*, this Court enumerated the elements necessary to obtain a conviction under section 1014 as follows:

> (1) That the defendant made a "false statement or report," "willfully overvalue[d] any land, property or security," and
>
> (2) That he did so "for the purpose of influencing in any way the action of [a described financial institution] upon any application, advance . . . commitment, or loan."

Williams, 458 U.S. at 284. It is true that the Court did not enumerate a materiality requirement in its discussion of section 1014. However, it is also true that the Court did not explicity reject materiality or even discuss it to any degree in its opinion.

As the Government points out, the issue of materiality was not presented to the Court. Furthermore, many circuits have continued to recognize materiality after the *Williams* decision. *See United States v. Ryan*, 828 F.2d 1010, 1014-15, n.1 (3d Cir. 1987). The *Ryan* Court did not view *Williams* as an implicit rejection of the materiality requirement by this Court. *See id.* Thus, Respondents submit that *Williams* is not dispositive to the issue of materiality one way or the other.

Kungys v. United States, 485 U.S. 759 (1988), cited by the Government, is also distinguishable from the present case. *Kungys* involved 8 U.S.C. § 1101(f)(6), which provides that a person shall be deemed not to be of good moral character if he "has given false testimony for the purpose of obtaining" naturalization benefits. In concluding that materiality was not a requisite element of this statute, the Court noted that the purpose of the statute was to actually identify a lack of good moral character, instead of generally protecting the naturalization process from falsities. *Kungys*, 485 U.S. at 780. Thus, this particular statute was concerned with any act of misrepresentation that would be relevant to determine moral character.

Unlike the statute in *Kungys*, section 1014 does not involve a determination of good moral character. The *Kungys* opinion even acknowledges that a previous Supreme Court decision read a materiality requirement into a statutory element that did not explicitly contain materiality. *Kungys*, 485 U.S. at 781 (citing *Fedorenko v. United States*, 449 U.S. 490 (1981) (materiality applies to willful misrepresentation element even though materiality not in text of the statute)). The Court distinguished the statute in *Fedorenko* from the statute in *Kungys* because the term "misrepresentation" was used, which has a long history of a materiality implication. *See Kungys*, 485 U.S. at 781. Thus, the statute in *Fedorenko*, which contained "misrepresentation," should have a materiality element implied as recognized by common law. However, the *Kungys* Court did

note that it was not prepared to state that the element of "false" can never imply a requirement of materiality. *Id.* Seeing that the law of false statements has long recognized materiality as an element at common law, the *Kungys* opinion actually suggests that it would be permissible to read materiality into section 1014.

G. There are Good Reasons to Require Materiality in Section 1014 Prosecutions

One of the concerns voiced by some courts in recognizing the element of materiality is the highly penal nature of federal false statements statutes. For example, the statutory range of punishment under section 1014 is a term of imprisonment not more than 30 years, a fine of not more than $1,000,000, or both. 18 U.S.C. § 1014. Due to the harsh nature of the potential criminal penalties involved, courts have required that the element of materiality be taken seriously. *See, e.g., United States v. Williams*, 12 F.3d 452, 456 (5th Cir. 1994); *United States v. Beer*, 518 F.2d 168, 170-71 (5th Cir. 1975) (section 1001 case). Concerns of harsh criminal penalties have been recognized by this Court in numerous contexts. *See, e.g., Williams v. New York*, 337 U.S. 241, 247 (1949) ("A prevalent modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime."); *Liparota v. United States*, 471 U.S. 419, 426 (1985) (Court was concerned that a suggested interpretation of a statute would criminalize a broad range of apparently innocent conduct); *Staples v. United States*, 114 S. Ct. 1793, 1802 (1994) (the potentially harsh penalties attached to a violation of the statute in question was a consideration by the Court in its ruling regarding the requirement of a mental intent element).

Another long-recognized canon of statutory construction is that criminal statutes are to be strictly construed. *See, e.g., Smith v. United States*, 360 U.S. 1, 9 (1959); *United*

States v. Beer, 518 F.2d 168, 171 (5th Cir. 1975). "The rule that penal laws are to be construed strictly, is perhaps not much less old than [statutory] construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 95 (1820); *see generally* Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION, § 59.05, at 126 (5th ed. 1992) (strict construction of penal statutes is founded on policy of protecting the interests of those against whom penalties are sought to be enforced). Under this canon of construction, when courts analyze a pervasive, all-encompassing statute, such as section 1014, they are extremely careful to insure that reasonable limits are observed. *Beer*, 518 F.2d at 170. This canon of construction, coupled with the ambiguities created by the enactment of section 1014, all support the element of materiality in section 1014, as recognized by the numerous federal appellate courts.

The importance of ensuring that reasonable limits are imposed on broad criminal statutes, such as section 1014, was discussed in *Staniforth*, 971 F.2d at 1355. Writing for the Seventh Circuit, Judge Posner concluded that the requirement of materiality prevents the statute from punishing harmless or trivial attempts. *See Staniforth*, 971 F.2d at 1358. *See also Beer*, 518 F.2d at 170-71 (to exclude trivial falsehoods from the purview of the statute, courts have required a materiality requirement under the second clause of 18 U.S.C. 1001). Without materiality, Judge Posner felt that the potential reach of section 1014 would be greatly expanded with few benefits. *Staniforth*, 971 F.2d at 1358. Such an expansion of section 1014, without materiality, would lead to unnecessary litigation over trivial or immaterial statements, and would violate the interests of justice.

III. IF THIS COURT DETERMINES THAT MATERIALITY IS NOT AN ELEMENT OF 18 U.S.C. § 1014, THEN THE CASE MUST STILL BE REMANDED FOR A NEW TRIAL BECAUSE THE JUDGE'S DETERMINATION OF MATERIALITY AND INSTRUCTION TO THE JURY TO DISREGARD MATERIALITY ESSENTIALLY TOOK AWAY FROM THE JURY'S DETERMINATION THE ELEMENTS OF "PURPOSE OF INFLUENCING" AND WHETHER THE STATEMENT WAS "FALSE."

The government argues that the element enumerated in section 1014, which requires that the statement be made "for the purpose of influencing in any way the actions" of a covered institution forecloses or precludes a separate materiality requirement. Govt. Br. 20-22. The Government states that if statements are made for the purpose of influencing actions of a covered institution, the statements must be material because immaterial statements would not influence the banks. Govt. Br. 21. Thus, the Government suggests materiality is an element of the offense, but argues materiality qualifies "purpose of influencing" but not the false statements themselves.

The "purpose of influencing" language in section 1014 places emphasis on the defendant's intent, while materiality looks to the actual statements made and the nature of those statements. It is possible that a defendant could make a trivial or harmless statement with the purpose or intent to influence the bank's decision.

This distinction has been noted where materiality has been recognized as separate and distinct from the defendant's specific mental intent. *See, e.g., United States v. Lopez*, 71 F.3d 954, 960-61 (1st Cir. 1995), *cert. denied*, ___ U.S. ___, 1996 U.S. LEXIS (1996) (the question of purpose or the defendant's specific intent differs from materiality; purpose

could exist without materiality and vice versa). The issue of the defendant's specific intent is generally a subjective inquiry, while issues of materiality involve an objective inquiry. The government's suggestion that "for the purpose of influencing" must necessarily include or encompass materiality confuses these two separate and independent concepts.

Thus, although the Respondents submit that materiality is a separate concept from intent, the government's argument, taken as true, raises additional problems. If these two concepts are inextricably linked together, as suggested by the Government, then the judge's instruction that defines materiality for the jury and then tells the jury not be concerned with determining materiality essentially took away from the jury the element of "for the purpose of influencing." In this regard, Respondents adopt herein the Amicus Brief submitted by NACDL, which expands upon this issue at greater length.

In addition to the element of "for the purpose of influencing," the jury instructions in this case defined a "false statement" using materiality. Instruction 20 stated as follows:

> A statement or representation is "false" when it is untrue when made or effectively conceals a material fact. A material fact is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction.

J.A. 42. After defining a false statement, using materiality, the judge goes on to instruct the jury that:

> The materiality of the statement or representation alleged to be false or concealed is not a matter with which you are to be concerned and should not be considered by you in

> determining the guilt or innocence of the defendant.

J.A. 44. How can these convictions be affirmed when the very definition of a false statement, an undisputed element for the jury to determine under section 1014, utilizes materiality? The judge's determination of materiality thus took this element away from the jury's consideration.

If this Court were to hold that materiality is not an element of section 1014, it is still not possible to simply affirm the convictions at the district court level. As raised earlier, materiality was charged and included as an element below, and was determined by the judge instead of the jury. Further, the judge's materiality instructions effectively precluded the jury from determining whether the statement was false and whether the Respondents acted with the purpose of influencing a financial institution. For these reasons, in the event that this Court would determine that materiality is not an element, this case still must be remanded to the district court for a new trial.

CONCLUSION

For the reasons set forth herein, the opinion of the United States Court of Appeals for the Eighth Circuit should be affirmed in all respects. However, if this Court would determine that materiality is not an element of section 1014, the Eighth Circuit opinion should nonetheless be affirmed because the Government conceded that materiality is an element in this particular case. Finally, alternatively, this case should be remanded for a new trial because the judge's determination of materiality took away from the jury's determination certain elements under section 1014: (1) that an act be done for the prupose of influencing a financial institution; and (2) that the statement made was false.

Respectfully submitted,

JAMES R. WYRSCH
(Counsel of Record)
RONALD D. LEE
W. BRIAN GADDY
WYRSCH ATWELL MIRAKIAN
LEE & HOBBS, P.C.
1101 Walnut Street, Suite 1300
Kansas City, MO 64106-2122
(816) 221-0080
Attorneys for Respondents

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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

JERRY E. WELLS AND KENNETH R. STEELE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

17 pp

TABLE OF AUTHORITIES

Cases:	Page
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	11
Demarest v. *Manspeaker*, 498 U.S. 184 (1991)	4
Fogerty v. *Fantasy, Inc.*, 510 U.S. 517 (1994)	4
Ford v. *United States*, 273 U.S. 593 (1927)	8
Kay v. *United States*, 303 U.S. 1 (1938)	3
Liparota v. *United States*, 471 U.S. 419 (1985)	5
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986)	2, 5
Staples v. *United States*, 114 S. Ct. 1793 (1994)	2, 5
Stevens v. *Department of Treasury*, 500 U.S. 1 (1991)	6
Stirone v. *United States*, 361 U.S. 212 (1960)	9
United States v. *Abod*, 770 F.2d 1293 (5th Cir. 1985)	10
United States v. *Adams*, 1 F.3d 1566 (11th Cir. 1993), certs. denied, 510 U.S. 1198 and 1206 (1994)	8
United States v. *Alzanki*, 54 F.3d 994 (1st Cir. 1995), cert. denied, 116 S. Ct. 909 (1996)	11
United States v. *Blake*, 941 F.2d 334 (5th Cir. 1991), cert. denied, 506 U.S. 998 (1992)	11
United States v. *Camp*, 541 F.2d 737 (8th Cir. 1976)	9
United States v. *Cleary*, 565 F.2d 43 (1977), cert. denied, 435 U.S. 915 (1978)	4
United States v. *Corpus*, 882 F.2d 546 (1st Cir.), certs. denied, 493 U.S. 958 (1989), 497 U.S. 1009 (1990)	8-9
United States v. *Gaudin*, 115 S. Ct. 2310 (1995)	6
United States v. *Jokel*, 969 F.2d 132 (5th Cir. 1992)	9, 10
United States v. *Killip*, 819 F.2d 1542 (10th Cir.), certs. denied, 484 U.S. 865 and 987 (1987)	10
United States v. *McMahon*, 861 F.2d 8 (1st Cir. 1988)	9

Cases—Continued: Page

United States v. *Miller*, 471 U.S. 130 (1985) 8
United States v. *Nordberg*, 612 F.2d 1 (1st Cir. 1979) 9
United States v. *Restrepo-Contreras*, 942 F.2d 96 (1st Cir. 1991), cert. denied, 502 U.S. 1066 (1992) ... 8
United States v. *Ribaste*, 905 F.2d 1140 (8th Cir. 1990) 7
United States v. *Shabani*, 115 S. Ct. 382 (1994) 3, 5
United States v. *Sharpe*, 996 F.2d 125 (6th Cir.), cert. denied, 510 U.S. 951 (1993) 11
United States v. *Staniforth*, 971 F.2d 1355 (7th Cir. 1992) 9
United States v. *Williams*, 504 U.S. 36 (1992) 6
United States v. *X-Citement Video, Inc.*, 115 S. Ct. 464 (1994) 5
Virginia Bankshares, Inc. v. *Sandberg*, 501 U.S. 1083 (1991) 6

Statutes:

18 U.S.C. 1014 ..... *passim*
18 U.S.C. 1621 2
26 U.S.C. 5845(f) 10

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JERRY E. WELLS AND KENNETH R. STEELE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Section 1014 of Title 18 is violated when a person "knowingly makes any false statement or report * * * for the purpose of influencing in any way the action," *inter alia*, of a federally insured bank. This Court granted certiorari on the question whether the materiality of the false statement or report is an element of the offense described by Section 1014. In our opening brief, we argued that, in light of the statute's text and history, materiality is not an element of that offense. While respondents take issue with that argument (Resp. Br. 20-36), they (Resp. Br. 11-20, 37-39) and their amici (NACDL Br. 4-13) principally seek affirmance on the ground that factors particular to the indictment, trial, or appeal in this case require

reversal of their convictions. Respondents' arguments lack merit.

1. On the question whether materiality is an element of Section 1014, respondents' argument proceeds entirely from the premise (Resp. Br. 25, 27, 30) that the text and history of Section 1014 are "ambiguous" on that question. Respondents argue that the Court should resolve that ambiguity by imputing a materiality element to the statute, based on the fact that materiality was an element of the offense of perjury at common law (Resp. Br. 23-24), the policy interest in "ensuring that reasonable limits are imposed on broad criminal statutes" (Resp. Br. 36), and the rule of lenity (Resp. Br. 30-31).

The text of Section 1014, however, is not ambiguous, and there is thus no warrant for consulting such nontextual sources. Rather, the statute simply does not include a textual materiality element. It is not relevant that materiality was an element of the offense of perjury at common law (Resp. Br. 23). Federal offenses are creatures of statute, and the modern-day United States Code makes materiality an element of some false-statement offenses (and of perjury, see 18 U.S.C. 1621) but not of others (including Section 1014). As this Court has often held, Congress's textual definition of the elements of a criminal offense ordinarily is decisive. See *Staples* v. *United States*, 114 S. Ct. 1793, 1796 (1994); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986); U.S. Br. 12.

There is no basis for respondents' supposition that, in enacting Section 1014, Congress either inadvertently neglected to address the question of materiality (Resp. Br. 27) or omitted a materiality element as a result of a "drafting error" (Resp. Br. 31), justifying imputation of that element. There is no evidence that

Congress ever intended to make materiality an element of Section 1014. On the contrary, Congress has included a materiality element in particular false statement statutes, while conspicuously omitting that element from Section 1014. See U.S. Br. 13-15. In light of the "textual variations" among those closely related statutes on the issue of materiality, the absence of a materiality element from the text of Section 1014 "speaks volumes" about Congress's intention to omit a materiality element from that statute. *United States* v. *Shabani*, 115 S. Ct. 382, 385 (1994).

Additional evidence that Congress intentionally omitted a materiality element from Section 1014, and did not act inadvertently, is found in Section 1014's history. Of the 13 false-statement statutes that in 1948 were consolidated in Section 1014, ten did not include a textual materiality element, while three others did. See U.S. Br. 15-19. Ten years before the enactment of Section 1014, this Court had held, in a case involving one of the ten predecessor statutes to Section 1014 that did not contain a textual materiality element, that the government could establish a violation of that statute even where the false statements in question "were not influential *or the information not important.*" See *Kay* v. *United States*, 303 U.S. 1, 5-6 (1938) (emphasis added); U.S. Br. 17-18.[1] Particularly in light of *Kay*, Congress's decision to pattern Section 1014 on the ten statutes that did not contain a

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[1] Contrary to respondents' claim that *Kay* only "addressed the issue of not having to prove actual reliance by the bank," Resp. Br. 33, *Kay* expressly rejected any need to show that the false statements were "important"—*i.e.*, material—to the bank. 303 U.S. at 6.

textual materiality requirement, rather than the three statutes that did, is consistent only with the conclusion that materiality would not be an element of the new statute.

Respondents note (Resp. Br. 29) that several courts of appeals have held that materiality is an element of Section 1014 and that Congress has since amended Section 1014 without explicitly rejecting those decisions. Congress's failure to repudiate those decisions, however, is of no weight when dealing with "language as plain" as found in Section 1014. *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991) ("Where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction."). In addition, the circuits have not uniformly read a materiality requirement into Section 1014; the longstanding view of the Second Circuit is to the contrary. See *United States* v. *Cleary*, 565 F.2d 43, 46 (2d Cir. 1977), cert. denied, 435 U.S. 915 (1978). "This is hardly the sort of uniform construction that Congress might have endorsed." *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 531-532 (1994) (rejecting ratification argument where "there was no settled * * * interpretation * * * about which Congress could have been aware"). Nor do any of Congress's amendments to Section 1014, which simply expanded the list of covered financial institutions (see U.S. Br. 19 n.10), support the suggestion that Congress silently embraced a materiality requirement absent from the text of Section 1014.

Finally, respondents argue that the addition of a materiality element would be desirable as a policy matter (Resp. Br. 35-36). That argument ignores the fact that Congress, in defining the elements of the statute, made a judgment, reflected in the statutory

text, as to the appropriate coverage of Section 1014. Respondents rely on cases in which this Court has imputed an intent element to statutes whose text does not refer to the defendant's *mens rea*. See Resp. Br. 26. As we have explained (U.S. Br. 16 n.9), however, in those cases, the Court has taken "particular care * * * to avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.'" *Staples* v. *United States*, 114 S. Ct. 1793, 1799 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 426 (1985)); see also *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 469 (1994). A defendant who has knowingly made a false statement "for the purpose" of influencing the action of a bank, however, has not engaged in "apparently innocent conduct." *Staples*, 114 S. Ct. at 1799.[2]

From all of the above, it follows that the rule of lenity is inapplicable here. See Resp. Br. 30-31. That rule "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *Shabani*, 115 S. Ct. at 386; *Staples*, 114 S. Ct. at 1804 n.17. That is not the case with respect to Section 1014.

2. Respondents also argue that, even if materiality is not an element of Section 1014, various factors specific to respondents' case required that materiality be treated here as an element and that the judgment must therefore be affirmed. Respondents'

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[2] Nor are respondents assisted by this Court's practice of construing statutes narrowly "to avoid serious constitutional questions" (Resp. Br. 30 n.17). There is no constitutional problem in punishing the knowing making of a false statement for the purpose of influencing a bank, even where there is no showing of materiality.

claims largely reprise arguments made in their brief opposing our petition for a writ of certiorari, and raise claims that were not passed upon by the court of appeals. Because those claims are not encompassed within the question on which certiorari was granted, this Court should not address them.

a. Respondents argue (Resp. Br. 11, 17-20) that the government is precluded from arguing that materiality is not an element of Section 1014 because the government did not initially make that argument in the court of appeals. Rather, as respondents note (Resp. Br. 11), the government first argued that materiality was not an element of Section 1014 after the court of appeals, on June 22, 1995, requested supplemental briefing regarding the effect of this Court's June 19, 1995, decision in *United States* v. *Gaudin*, 115 S. Ct. 2310.

As an initial matter, this Court's traditional rule "precludes a grant of certiorari only when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted). That "rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Ibid.*; see also *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). That rule is sensible, because when a court of appeals has announced a legal principle of general applicability, it has established governing law for future cases in its jurisdiction. A court's resolution of an issue of law is fairly presented for review, whether or not it was "pressed" by a party. And there can be no doubt that the court of appeals in this case squarely decided the legal issue of whether materiality is an element of Section 1014 in a fashion that will bind courts in all Section 1014 prosecutions in the Eighth Circuit.

In any event, respondents' claim of untimeliness is without merit. Before *Gaudin*, the question whether materiality was an element of Section 1014 was of little practical importance because, under the existing precedent in the Eighth Circuit and almost every other circuit, questions of materiality were decided by the trial judge, not the jury, and district judges routinely found the materiality element to have been established. See, *e.g.*, *United States* v. *Ribaste*, 905 F.2d 1140, 1143 (8th Cir. 1990). The government accordingly did not have occasion or need to contest the holding of the majority of courts of appeals that materiality was an element of the Section 1014 offense.

After respondents were convicted and they appealed, the government again did not have occasion to raise the materiality issue in its initial brief on appeal. Respondents, for their part, did not claim that it was error for the district court to resolve the materiality issue itself. See J.A. 76 ("because of existing law in this circuit, the issue was not briefed" in respondents' opening and reply briefs).[3] Only after the court of appeals directed the parties to brief the effect of *Gaudin* did respondents raise that claim; the government properly replied that there was no error

[3] Respondents' sole argument with regard to materiality in their initial court of appeals brief was that the evidence of materiality was insufficient. The government responded that respondents' false statements regarding their service obligations with customers and regarding their wives' personal loan guarantees were material to the banks' decisions to extend loans to them. The court of appeals agreed that those false statements were material. See Pet. App. 16a-18a.

under *Gaudin*, because materiality is not an element of the Section 1014 offense. Thus, there was nothing untimely about the government's submission. Nor did the court of appeals suggest it was untimely; the court, after receiving the supplemental briefs of the parties, addressed the issue and reversed respondents' convictions based on its holding that materiality is an element of the Section 1014 offense. Pet. App. 10a-14a.

b. Respondents also err in relying (Resp. Br. 12-15) on the fact that the government described respondents' false statements as material in the indictment in this case. The district court is not required to instruct the jury that, to convict, it must find each of the facts alleged in the indictment to have been established beyond a reasonable doubt. Rather, the district court is permitted to delete surplusage not essential to the charge, and "[a] part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as 'a useless averment' that 'may be ignored.'" *United States* v. *Miller*, 471 U.S. 130, 136 (1985), quoting *Ford* v. *United States*, 273 U.S. 593, 602 (1927); see *United States* v. *Adams*, 1 F.3d 1566, 1582 (11th Cir. 1993) (failure to prove quantity of drugs alleged in indictment is not a material variance), certs. denied, 510 U.S. 1198 and 1206 (1994); *United States* v. *Restrepo-Contreras*, 942 F.2d 96, 98 (1st Cir. 1991) (where statute did not require government to establish defendant's specific intent as alleged in the indictment, no proof was required of that intent), cert. denied, 502 U.S. 1066 (1992); *United States* v. *Corpus*, 882 F.2d 546, 553 (1st Cir.) (conviction affirmed where the indictment charged that the defendants possessed a larger quantity of drugs than was shown by the

proof at trial), certs. denied, 493 U.S. 958 (1989), 497 U.S. 1009 (1990); *United States* v. *McMahon*, 861 F.2d 8, 12-13 (1st Cir. 1988) (non-essential allegation in indictment need not be supported by sufficient evidence).[4]

Also unavailing is respondents' related argument (Resp. Br. 15-17) that, even if materiality is not an element of Section 1014, it must be treated as such here, because materiality was mentioned in several jury instructions describing the Section 1014 offense. Respondents rely (Resp. Br. 16-17) on *United States* v. *Jokel*, 969 F.2d 132, 136 (5th Cir. 1992) (per curiam), and other decisions holding that a jury instruction that increases the prosecution's burden of proof and to which the prosecution does not object becomes the "law of the case." The jury instructions in this case, however, did not increase the government's burden of

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[4] *Stirone* v. *United States*, 361 U.S. 212 (1960), on which respondents rely (Resp. Br. 13), is inapposite. In *Stirone*, the trial court improperly added "a new basis for conviction" in its instructions that was different from the basis of the charge set out in the indictment. 361 U.S. at 217. *United States* v. *Staniforth*, 971 F.2d 1355, 1357 (7th Cir. 1992), also relied on by respondents (Resp. Br. 13), similarly observed that it is improper to convict a defendant on a charge not contained within the indictment. The district court here did not commit that error when it did not require the jury to decide whether the false statements were material. As for *United States* v. *Camp*, 541 F.2d 737 (8th Cir. 1976) (Resp. Br. 13), it merely stated the fundamental principle that an indictment must allege all the essential elements of an offense. And in *United States* v. *Nordberg*, 612 F.2d 1 (1st Cir. 1979) (Resp. Br. 14-15), the Section 1014 count of the indictment alleged that false statements were material, and the government conceded that, for purposes of the case, it had to prove materiality. 612 F.2d at 1 n.3. We do not make that concession here.

proof so as to require proof of materiality. Rather, the jury was specifically instructed that it was not to consider whether respondents' false statements were material. See J.A. 43. Indeed, the very basis of the reversal of respondents' convictions was the *absence* of an instruction requiring the jury to find that their false statements had been material.[5]

c. Respondents are also mistaken in claiming (Resp. Br. 17-20) that under the "invited error" doctrine, the government may not assert that materiality is not an element of Section 1014. That doctrine

[5] The decisions on which respondents rely (Resp. Br. 16-17) all involve circumstances where the jury was instructed (without objection) that, to convict, it must find that the government had proved certain facts beyond a reasonable doubt. Those decisions held that an instruction that increases the government's burden and to which the government does not object becomes the "law of the case," even if those facts are not elements of the offense. See, *e.g.*, *United States* v. *Jokel*, 969 F.2d at 136 (instruction increasing the government's burden of proof beyond the statutory elements of 26 U.S.C. 5845(f) to require proof that destructive devices were completed permits a claim on appeal that evidence was insufficient to show that fact); *United States* v. *Killip*, 819 F.2d 1542, 1547-1548 (10th Cir.) (where instruction required proof that defendant personally agreed to commit two predicate crimes to convict him of RICO conspiracy, the conviction would be reversed if the evidence of that agreement was insufficient, regardless whether instruction was correct), certs. denied, 484 U.S. 865 and 987 (1987); *United States* v. *Abod*, 770 F.2d 1293, 1295 n.1 (5th Cir. 1985) (appellate court considers sufficiency of evidence that defendant knew credit card was counterfeit, rather than stolen, whether or not such knowledge was an element of the statutory offense, because instructions had required such proof). Those decisions do not apply where, as here, the jury is not instructed that it must find a fact that increases the government's burden beyond the statutory elements of the offense.

provides that a party "may not complain on appeal" of errors that the party itself invited or encouraged the trial court to commit. See *United States* v. *Sharpe*, 996 F.2d 125, 129 (6th Cir.), cert. denied, 510 U.S. 951 (1993). The government did not "complain on appeal," and does not now claim, that the trial court erred. It is respondents, not the government, who contend that the trial court erred by not submitting the issue of materiality to the jury. The government can defend the district court's judgment on the ground that materiality is not an element of the Section 1014 offense, because an appellate court may affirm a trial court's ruling on any ground apparent from the record. *United States* v. *Alzanki*, 54 F.3d 994, 1008 (1st Cir. 1995), cert. denied, 116 S. Ct. 909 (1996); *United States* v. *Blake*, 941 F.2d 334, 339 (5th Cir. 1991), cert. denied, 506 U.S. 998 (1992); see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 n.7 (1984).

d. Respondents (Resp. Br. 37-39) and their amici (NACDL Br. 3-14) further claim that, even if materiality is not an element of Section 1014, reversal of their convictions was nonetheless warranted because the district court's instructions mentioning materiality were otherwise defective. Those claims were not raised or passed upon below and do not merit this Court's review. In any event, respondents' claims of instructional error lack merit.

Respondents assert, first (Resp. Br. 38), that the instruction directing the jury not to consider the materiality of the alleged false statements precluded the jury from properly considering the intent element of Section 1014, which requires the government to establish that those false statements were made "for the purpose of influencing" the bank. The district

court, however, merely instructed the jury that the materiality of the statement alleged to be false "is not a matter with which you are concerned and should not be considered by you in determining the guilt or innocence of the defendant." J.A. 43. That instruction did not bar the jury from considering the distinct question whether respondents' false statements had been made for the purpose of influencing the banks' actions—an issue on which the jury was specifically instructed. J.A. 41-42.

Respondents and their amici are also incorrect to claim that, by determining materiality, the district court "essentially took away from the jury the element of 'for the purpose of influencing.'" (Resp. Br. 38; NACDL Br. 4-14). It is true that juries will sometimes look to the materiality or immateriality of a defendant's false statements as a means of determining whether the defendant acted with the purpose of influencing the bank. As respondents acknowledge (Resp. Br. 38), however, the issues of intent and materiality are analytically distinct, and it is possible to establish by other means (including through testimony of confederates or statements of the defendant) that a defendant acted with the purpose of influencing the bank.[6] Moreover, because the district court in this case did not tell the jury that it had already found

[6] Respondents are wrong to claim that "[t]he Government states that if statements are made for the purpose of influencing actions of a covered institution, the statements must be material because immaterial statements would not influence the banks." Resp. Br. 37 (citing U.S. Br. 20-22). Rather, our view is that, while offenses prosecuted under Section 1014 often will involve materially false statements, Section 1014 also applies to immaterial false statements, provided that the other elements of the offense are established.

respondents' false statements to be material, there was no possibility that the court's finding influenced the jury's determination on the intent element.

Finally, respondents claim (Resp. Br. 38-39) that the district court erred in instructing the jury that "[a] statement or representation is 'false' when it is untrue when made or effectively conceals a material fact. A material fact is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction." J.A. 42.[7] It is unlikely that the reference to materiality in that definition had any impact upon the jury's consideration of the falsity of the statements at issue, in light of the court's ensuing instruction not to consider the materiality of the charged statements. J.A. 43. The instruction did not deprive the jury of its responsibility to determine whether respondents' statements were, in fact, false.

[7] Respondents contend in passing (Resp. Br. 25 n.12) that, because Section 1014 punishes false statements but does not refer to "omitted information," their failure to disclose their service agreements when they applied for bank financing did not violate the statute. The court of appeals correctly rejected that argument (see Pet. App. 14a-16a). A loan application that selectively omits responsive information regarding potential liabilities constitutes a "false statement" within the meaning of Section 1014. See Pet. App. 15a (citing cases).

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

SEPTEMBER 1996

Supreme Court, U.S.
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No. 95-1228 (6)

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

JERRY E. WELLS AND KENNETH R. STEELE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

BEVERLY A. POHL
Suite 900
100 N.E. Third Avenue
Fort Lauderdale, FL 33301
(954) 767-8909

BRUCE S. ROGOW
Counsel of Record
BRUCE S. ROGOW, P.A.
2441 S.W. 28th Avenue
Fort Lauderdale, FL 33312
(954) 767-8909

Attorneys for Amicus Curiae

9242
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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QUESTIONS PRESENTED

I.

Section 1014 of Title 18 imposes criminal penalties on a person who "knowingly makes any false statement or report * * * for the purpose of influencing in any way the action," *inter alia*, of a federally insured bank. The question presented is whether the materiality of the false statement or report is an element of the offense described by Section 1014.

II.

If the materiality of a false statement is *not* an element of 18 U.S.C. § 1014, but rather the evidentiary foundation for the element of "purpose of influencing," is a new trial required where, at the government's request, the district court tells the jury that materiality is an element of the offense, defines materiality, and decides as a matter of law that the statement is material?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CITATIONS iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

SINCE THE "PURPOSE OF INFLUENCING" ELEMENT OF 18 U.S.C. § 1014 IS USUALLY PROVEN BY AN INFERENCE FROM THE MATERIALITY OF THE STATEMENTS (GOVT. BR. 10), THE CONCLUSION THAT THE STATEMENTS WERE MATERIAL AS A MATTER OF LAW COMPROMISED THE JURY'S FUNCTION TO DETERMINE "PURPOSE OF INFLUENCING" AND REQUIRES A NEW TRIAL

CONCLUSION 14

TABLE OF CITATIONS

CASES PAGE

Bollenbach v. United States, 326 U.S. 607 (1946) . . 12

Carella v. California, 491 U.S. 263 (1989) 14

Kay v. United States, 303 U.S. 1 (1938) 8

Kungys v. United States, 485 U.S. 759 (1988) 12

United States v. Gaudin, 515 U.S. ___ , 115 S.Ct. 2310 (1995) 2, 4, 13

United States v. Lueben, 838 F.2d 751 (5th Cir. 1988) 13

United States v. Lopez, 71 F.3d 954 (1st Cir. 1995), petition for cert. pending, No. 95-1745 and 95-8569 . . . . . *7*

United States v. Nash, 76 F.3d 282 (9th Cir. 1996) 9

United States v. Ross, 77 F.3d 1525 (7th Cir. 1996) 9

United States v. Wells, 63 F.3d 745 (8th Cir. 1995) 9

Williams v. United States, 458 U.S. 279 (1982) 8

STATUTES	PAGE
18 U.S.C. § 1014	*passim*

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a membership of more than 8,700 attorneys

[1] The parties have consented to the filing of this Brief. Their letters of consent have been filed with the Clerk.

and 28,000 affiliate members, including representatives from all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage integrity, independence and expertise of defense lawyers. Among the NACDL's stated objectives is the promotion of the proper administration of justice. Thus, the members of the NACDL have a vital interest in insuring that the integrity of the federal and state systems of criminal justice are protected. This includes an interest in this case dealing with the construction of a federal criminal statute and the jury instructions pertaining to the offense.

SUMMARY OF THE ARGUMENT

The NACDL supports respondents arguments, and the Eighth Circuit's decision below, which held that a conviction under 18 U.S.C. § 1014 requires proof of a false statement of a *material* fact, and, that under *United States v. Gaudin*, 515 U.S. ___ (1995), the trial court's determination of "materiality" as a matter of law violates the Sixth Amendment and requires a new trial. In addition, the NACDL offers an independent reason for a new trial, even if the Government prevails in its new-found view that materiality is not an element of 18 U.S.C. § 1014.

If the materiality of a false statement is not an

element of 18 U.S.C. § 1014, the judicial determination that the defendants' statements were material as a matter of law (i.e., "capable of influencing" the bank), improperly and prejudicially influenced the jury on the element of intent ("purpose of influencing" the bank). The Government's arguments, in trying to establish that materiality is not an element of the crime, make our point.

The Government acknowledges that the defendant's intent to influence the bank "will usually be established as an inference from the actual materiality of the false statement itself." Government Br. 10. Clearly, under the Government's construct, the two concepts -- purpose of influencing and materiality of the statements -- are inextricably intertwined. Thus, where the judge has concluded and announced that a defendant's statements are material, the jury's essential function to decide the "purpose of influencing" element of the crime is fatally compromised. The judicial conclusion that the statements are material, under the Government's view that proof of materiality leads inexorably to proof of intent, violates both *Gaudin* and the line of precedents forbidding irrebuttable, conclusive presumptions in the criminal law. The trial judge's determination of materiality should not be allowed to supply the foundation for the jury's inferences about proof of an element of the crime.

ARGUMENT

SINCE THE "PURPOSE OF INFLUENCING" ELEMENT OF 18 U.S.C. § 1014 IS USUALLY PROVEN BY AN INFERENCE FROM THE MATERIALITY OF THE STATEMENTS (GOVT. BR. 10), THE CONCLUSION THAT THE STATEMENTS WERE MATERIAL AS A MATTER OF LAW COMPROMISED THE JURY'S FUNCTION TO DETERMINE "PURPOSE OF INFLUENCING" AND REQUIRES A NEW TRIAL

The Government charged respondents with making "false statements of material fact" (JA 30-33), referred below to "the materiality elemen[t]" of § 1014 (JA 55), argued that the evidence proved materiality (JA 50, 59-60), and requested and obtained an instruction defining materiality and that materiality was established as a matter of law (JA 36, 42-43). Only after this Court decided *United States v. Gaudin*, 515 U.S. ___ (1995) (essential element of the materiality of a false statement under 18 U.S.C. § 1001 must be submitted to the jury), did the Government take a different tack, arguing then to the Eighth Circuit that there can be no *Gaudin* error in an 18 U.S.C. § 1014 conviction because "materiality" is not an essential element of that crime (JA 62). In this Court, the Government has advanced two reasons in support of that argument.

First, the text of the statute does not make materiality an element. That we cannot dispute, although it does not end the inquiry. *See* Respondents' Brief. Second, the Government says that there is no reason to impute materiality as an element of section 1014 because . . .

> a similar purpose is already served by Section 1014's distinctive intent requirement, which requires prosecutors to establish not only that the defendant knowingly made the false statement but that the defendant made the false statement "for the purpose of influencing in any way the actions" of a covered financial institution. 18 U.S.C. 1014.

Government Br. 21. It is that second argument -- that materiality and § 1014's "distinctive intent requirement" have a "similar purpose" and are in fact interrelated -- which leads to the conclusion that the instructions in this case require a new trial even if materiality is not an element of § 1014.

The Government repeatedly stresses the similarity and relatedness between "materiality" and "purpose of influencing":

> As numerous courts have recognized, *a defendant's intent to influence a bank's actions will usually be established as an inference from the actual materiality of the false statement itself.*

Government Br. 10 (emphasis supplied). The Government

distinguishes other statutes with an explicit materiality requirement, saying they do not contain:

> . . . the distinctive intent requirement of Section 1014, which as we have discussed, largely serves the purpose of a materiality requirement in limiting the scope of conduct rendered criminal under the statute.

Government Br. 24. The symmetry between "materiality" and "intent to influence" is, according to the Government, confirmed by the cases:

> First, a similar purpose is already served by Section 1014's distinctive intent requirement . . . *See United States v. Lopez*, 71 F.3d 954, 961 (1st Cir. 1995) (proof of the requisite "purpose of influencing" will usually require an inference from proof of actual materiality. . . .; *see also Staniforth [United States v.]* 971 F.2d [1355], 1357-1358 [7th Cir. 1992] ("the less material the statement was, the less likely it was to have been made for the

> purpose of influencing the bank"). There is no reason to conclude that Congress intended an additional implicit materiality requirement to serve the *same purpose* of limiting the coverage of the statute.

Government Br. at 21-22 (emphasis supplied). *Lopez*, cited in the above paragraph, confirms that materiality mirrors "purpose of influencing":

> In theory, the question of purpose (the defendant's specific intent) differs from the question of materiality (whether an objective lender would be likely to be influenced by the statement). Purpose could exist without materiality, and vice versa. *But in most cases, no independent proof exists of a defendant's specific intent*; rather, the jury infers such purpose from the fact that the statement would so influence an ordinary lender.

United States v. Lopez, 71 F.3d 954, 960-961 (1st Cir. 1995) petition for cert. pending, Nos. 95-1745 and 95-8569

(emphasis supplied).

We believe that the view of all the circuits, save one -- that materiality is an essential element of § 1014 -- is correct. Therefore we concur in the respondents' argument that the Eighth Circuit should be affirmed on that ground.[2] But if all of those courts of appeal have erred, then the conviction below must still be reversed because the jury in this case was instructed that the defendants were charged with conspiring to make "false statements of material facts" (JA 38); that an "essential element" of the conspiracy to violate § 1014 was "withholding and concealing information of material fact for the purpose of influencing the action of the financial institution" (JA 39); that "the elements of making a false statement to a bank are . . . with[holding] information of material fact from the bank" (JA 41); and that:

> A statement or representation is "false" when it is untrue when made or effectively conceals a material fact. A material fact is a fact that would be important to a

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[2] The Government relies, *inter alia*, on *Kay v. United States*, 303 U.S. 1 (1938), and *Williams v. United States*, 458 U.S. 279 (1982), to suggest that this Court has already rejected materiality as an element of § 1014. Neither case carries the weight assigned to it by the Government. *Kay* is not a § 1014 case, and it stands only for the proposition that in a false statement to the Home Owners Loan Corporation "actual damage is not an ingredient of the offense." 303 U.S. at 6. *Williams* was a bad check § 1014 case which did not present the issue of whether materiality is a required element of the Government's proof.

> reasonable person in deciding whether to engage or not to engage in a particular transaction.

JA 42. The trial judge "determined as a matter of law that the statements were material and instructed the jury that they were not to deliberate on the issue of materiality." *United States v. Wells*, 63 F.3d 745, 749 (8th Cir. 1995). *See* JA 43.[3]

Thus, by telling the jury that § 1014 (and conspiracy to violate § 1014) proscribe and criminalize "material" false statements, defining materiality -- "a fact that would be important to a reasonable person in deciding whether to engage or not engage in a particular transaction" -- and by deciding that the defendants' statements or omissions were so material that the jury need not consider the issue, the trial court completely compromised the jury's function.

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[3] This case is not unique in that regard. Pattern jury instructions of the circuit courts of appeal for 18 U.S.C. § 1014 refer to false statements of "material" fact and define a "material" fact for the jury. *See e.g.*, Pattern Jury Instructions No. 31, Criminal Cases, U.S. Eleventh Circuit District Judges Association (1985 ed.). Prior to *Gaudin*, judges in all circuits which have found materiality to be an element of § 1014 would have decided that element as a matter of law, and so instructed the jury. *See e.g.*, *United States v. Nash*, 76 F.3d 282, 285 (9th Cir. 1996) (the trial court said, "false statements of income and assets are material for purposes of these instructions."); *United States v. Ross*, 77 F.3d 1525, 1538 (7th Cir. 1996) (the trial court "determined itself that the statements charged were 'material' and instructed the jury to consider the element of materiality to be established as a matter of law").

In its attempt to explain why this Court should reject materiality in the future as an element of § 1014, the Government makes an argument which supports the conclusion that in this case (and any other case in which a jury has been told that materiality is an element of the crime and the judge has found it to be present) the judicial determination of materiality requires reversal:

> Conditioning a conviction on the jury's having found the existence of an element extraneous to the text of a statute heightens the chances that, solely as a result of speculation or confusion regarding that extra element, a jury will not return a verdict of guilty that it otherwise regards as warranted.

Government Br. 25. But where a jury *has been told* that the "extraneous" element is essential to a conviction, and the judge has found it to be present, the chance that the jury will return a guilty verdict is at its zenith. That is especially so when the "extraneous" element of materiality is nearly synonymous with the "purpose of influencing" element. The Government's submission cements the point:

> The addition of a materiality element in cases brought under Section 1014 poses a particular risk of such

> speculation or confusion, because jurors will often have had personal experiences with financial and credit institutions. Despite a legal standard that focuses inquiry on whether the false statement had "a natural tendency to influence" a decision of a financial institution, *Gaudin*, 115 S. Ct. at 2313, jurors may be inclined improperly to inquire, based on their own experiences, whether the bank's action on the particular loan application or other submission at issue, would in fact have been any different absent the falsehood.

Government Br. 25. This Court does not have to speculate on the effect upon a jury which has been told that the statement prompting the charged offense was, as a matter of law, important to the bank, and would be "important to a reasonable person in deciding whether to engage or not engage in a particular transaction." Having been so instructed, jurors need not (indeed cannot) reflect on their own experiences. The answer to the "purpose of influencing" element has been made clear to them. If, as the Government concedes, "a defendant's intent to influence a bank's actions will usually be established as an inference from the actual materiality of the false statement itself" (Government Br. 10), then the trial court determination of

materiality has resulted in a directed verdict on the "purpose" element.

Even the Government's reliance on *Kungys v. United States*, 485 U.S. 759 (1988) (false representation for the purpose of obtaining immigration benefits need not be material) aids our argument. The Court recognized the strong relationship between materiality and intent to influence:

> Obviously it will be relatively rare that the Government will be able to prove that a misrepresentation that does not have the natural tendency to influence the decision regarding immigration or naturalization benefits was nonetheless made with the subjective intent of obtaining those benefits. This is especially so since the invalidating intent . . . must be proved by "clear, unequivocal, and convincing evidence which does not leave the issue in doubt."

485 U.S. at 780-781 (citations omitted).

Thus, either way the Government loses. If materiality is an essential element of § 1014, then *Gaudin* requires it to be left to the jury. If materiality is not an essential element, then telling the jury that it was, and that the trial court had found it to be proven, so tainted the

"purpose" inquiry that a new trial is required. This Court's comments in *Bollenbach v. United States*, 326 U.S. 607, 612 (1946), are apt:

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and determining questions of law." *Quercia v. United States*, 289 U.S. 466, 469 "The influence of the trial judge on the jury is necessarily and properly of great weight," *Starr v. United States*, 153 U.S. 614, 626, and jurors are ever watchful of the words that fall from him.

In a § 1014 case in which the judge has told the jury that a statement is material, even though materiality is not an element of the crime (assuming, *arguendo*, that materiality is not an element of § 1014), an attentive jury will pay heed to those words. The error in such an instruction is analogous to giving the jury an irrebuttable presumption as to an element of a crime. *See Carella v. California*, 491 U.S. 263, 265 (1989) (per curiam) (instructions relieving the States of the burden to prove each element beyond a reasonable doubt "subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases."); *Gaudin*, 515 U.S. at __, 115 S.Ct. 2310.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit Court of Appeals ordering a retrial on respondents' convictions should be affirmed.

Respectfully submitted

BRUCE S. ROGOW
BRUCE S. ROGOW, P.A.
2441 S.W. 28th Avenue
Fort Lauderdale, Florida 33312
(954) 767-8909
Counsel of Record
and
BEVERLY A. POHL
Suite 900
100 N.E. Third Avenue
Fort Lauderdale, Florida 33301
(954) 767-8909

Counsel for *Amicus Curiae*
National Association of Criminal
Defense Lawyers

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